No. A-543

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1984

SAN JOSE UNIFIED SCHOOL DISTRICT, CHARLES KNIGHT, individually and as District Superintendent of the San Jose Unified School District; NEIL H. GEIER, JR., ELIZABETH J. ALLEN, EDWIN P. JONES, JR., MARY K. MCCREATH, and DONALD L. RAIMONDI, individually and as members of the Board of Education of the San Jose Unified School District,
Petitioners,

vs.

ARNULFO M. DIAZ and SOCORRO DIAZ, as the parents and next friends of FERNANDO DIAZ, MIQUEL A. DIAZ and JUAN F. DIAZ; JOSE VASQUEZ, as the parent and next friend of DAVID VASQUEZ, individually and on behalf of all other persons similarly situated,
Respondents.

On Certiorari to the United States Court of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an inference of unconstitutional segregative intent arises as a matter of law when a local school district makes decisions on the basis of a neutral and even-handed neighborhood school policy that has the foreseeable and foreseen result of maintaining or intensifying existing de facto ethnic imbalance?

2. Whether a local school district that has not in the past operated an unconstitutional dual school system is forbidden as a matter of law from making decisions relating to the location of new schools, the closing of old schools, or the use of mobile classroom units on the basis of a neutral and even-handed neighborhood school policy, when these decisions have the foreseeable and foreseen result of maintaining or intensifying existing de facto ethnic imbalance?

3. Whether the Court below erred in interpreting the "clearly erroneous" standard of Fed. R. Civ. P. 52(a) as not requiring a duty of deference to a trial court's factual finding that a local school district has acted without segregative intent?

TABLE OF CONTENTS

	Page
Questions presented	i
Opinions below	1
Jurisdiction	1
Constitutional provisions and statutes	2
Statement of the case	2
A. The background of the litigation	2
B. The proceedings below	4
Reasons for granting the writ	8
I	
The decision below is contrary to the holdings of this Court	9
II	
The decision below will constitutionally prohibit the operation of neighborhood schools in many metropolitan areas	13
III	
The opinion below misinterpreted the "clearly erroneous" rule of Fed. R. Civ. P. 52(a) in such a manner as to impair significantly the orderly relationship between trial and appellate courts in the important and sensitive area of school desegregation	19
Conclusion	27

TABLE OF AUTHORITIES CITED

Cases

Page

Alexander v. Youngstown Board of Education, 675 F.2d 787 (6th Cir. 1982) 18, 21

Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252 (1977) 22

Clients' Council v. Pierce, 711 F.2d 1406 (8th Cir. 1983) 14

Columbus Board of Education v. Penick, 443 U.S. 449 (1979) 5, 12, 14, 22, 24

Commissioner v. Duberstein, 363 U.S. 278 (1960) 20

Crawford v. Board of Education, 458 U.S. 527 (1982) 14

Davis v. Board of Education, 674 F.2d 684 (8th Cir. 1982), *cert. denied*, 459 U.S. 881 (1982) 18

Dayton Board of Education v. Brinkman, 443 U.S. 526 (1979) 5, 9, 10, 11

Deal v. Cincinnati Board of Education, 369 F.2d 55 (6th Cir. 1966), *cert. denied*, 389 U.S. 847 (1967) 8

EEOC v. Pacific Southwest Airlines, 587 F. Supp. 686 (N.D. Cal. 1984) 24

Goldsboro City Board of Education v. Wayne County Board of Education, 745 F.2d 324 (4th Cir. 1984) 21

Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844 (1982) 20, 21, 24, 26

Keyes v. School District No. 1, 413 U.S. 189 (1973) 8

Larry P. v. Riles, 495 F. Supp. 926 (N.D. Cal. 1979) 24

Officers for Justice v. Civil Service Commission, 20 F.E.P. Cases 1304 (N.D. Cal. 1977) 24

Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976) 13

Pullman-Standard v. Swint, 456 U.S. 273 (1982) 20

Rogers v. Lodge, 458 U.S. 613 (1982) 20

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971) 10, 14

Table of Authorities Cited

Cases

Page

United States v. National Ass'n. of Real Estate Boards, 339 U.S. 485 (1950) 20, 26

United States v. Texas Education Agency, 600 F.2d 518 (5th Cir. 1979) 14

United States v. United States Gypsum Co. 333 U.S. 364 (1948) 21

Washington v. Seattle School District No. 1, 458 U.S. 457 (1982) 19

Zenith Corp. v. Hazeltine, 395 U.S. 100 (1969) 24

United States Constitution

U. S. Const. amend. XIV, § 1 2

Statutes

20 U.S.C. § 1701(a)(2) 8

28 U.S.C. § 1254(1) 2

42 U.S.C. § 1983 2

California Education Code §§ 39410 et seq. and 81130 et seq. 16

Federal Rules of Civil Procedure

Rule 52(a) 20, 21, 22, 24

Law Review Articles

Wright, The Doubtful Omniscience of Appellate Courts 41 Minn. L. Rev. 751 (1957) 20

OPINIONS BELOW

This is a petition for a writ of certiorari to issue to review the en banc judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on May 17, 1984, which reversed a decision of the United States District Court for the Northern District of California.

The opinion of the Ninth Circuit, which is reproduced as Appendix ("App.") A at pages A-1 through A-41, is reported at 733 F.2d 660 (9th Cir. 1984).

Two prior opinions of the Ninth Circuit in this proceeding are reported at 612 F.2d 411 (9th Cir. 1979) and 705 F.2d 1129 (9th Cir. 1983) and appear in App. E at pages A-100 through A-109, and in App. C at pages A-43 through A-56, respectively.

The District Court decisions in this matter are reported at 412 F.Supp. 310 (N.D. Cal. 1976) and 518 F.Supp. 622 (N.D. Cal. 1981) and appear in App. F at pages A-110 through A-162, and in App. D at pages A-57 through A-99, respectively.

The November 7, 1984 order of the Ninth Circuit on the petition for a rehearing en banc by the full court is unreported and is reprinted as App. B at page A-42.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on May 17, 1984. A timely petition for rehearing en banc by the full court was denied on November 7, 1984. App. B, A-42. An order extending time to file a petition for writ of certiorari until March 7, 1985, was granted by this Court on January 17, 1985. App. H at A-164.

This petition for certiorari was filed within the March 7, 1985, deadline.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOKED

U.S. Const. amend. XIV, § 1, provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983, provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

The litigation giving rise to this petition for certiorari began in 1971, when respondents brought suit in the United States District Court for the Northern District of California alleging that the schools of the San Jose Unified School District were unconstitutionally segregated on the basis of ethnicity.

A. THE BACKGROUND OF THE LITIGATION

The San Jose Unified School District ("District") is shaped like a slender, elongated crescent. It is approximately 16 air miles in length, and varies from a maximum of four to a minimum of one and one-half air miles in

width.[1] The northern half of the district encompasses downtown San Jose, while the southern half stretches into areas that are primarily suburban. *Diaz v. San Jose Unified School* ("Diaz I"), App. F, A-115. Between 1950 and 1970, student enrollment in the District increased by over 250%.[2] Virtually all of the increase in school age population occurred in the southern section of the District, where there has been an explosion of new suburban subdivisions. *Diaz v. San Jose Unified School District* ("*Diaz* III"), App. D, A-70.

The Hispanic or Spanish-surnamed population of the District is primarily concentrated in the District's northern, downtown sections; the southern suburban areas are primarily Anglo. Because of the peculiar shape and demography of the District, it represents a unique and extreme case of de facto ethnic separation. The District can be bisected with a line, north of which the student population is 60.5% Hispanic, south of which it is only .07% Hispanic.[3] There is no dispute that the vast majority of the District's schools are racially imbalanced.[4]

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[1]*Diaz v. San Jose Unified School District* (*Diaz* V), App. A, A-2. A map of the District may be found at App. G, A-163.

[2]*Diaz* I, App. F. A-116. In 1973, there were 36,687 students enrolled in the District. *Ibid.*

[3]*Diaz* III, App. F. A-69. Spanish-surnamed Americans are the only substantial minority in the District. *Diaz* I, App. E, A-114, A-116-117.

[4]At the time of the underlying litigation, the guidelines of the State of California defined as racially imbalanced any school in which a percentage of pupils of one or more ethnic groups differs by more than 15 percentage points from the percentage of that ethnic group in the total student population of the district. *Diaz* III, App. D, A-70. By that criterion, 41 out of 50 schools in the District were racially imbalanced in 1968.

B. THE PROCEEDINGS BELOW

In 1971 respondents commenced an action in federal district court on behalf of themselves and the class of all Spanish-surnamed students enrolled in the District and their parents, alleging that the District, its Superintendent, and the members of its Board of Education ("Board") had intentionally and purposefully operated and maintained a segregated public school system in violation of the Fourteenth Amendment to the United States Constitution.[5] The defendants in that action, who are now petitioners before this Court, admitted that its schools were racially imbalanced, but contended that the imbalance was due solely to its adherence to a neutral neighborhood schools policy, together with the District's unique demographic and residential patterns.

A trial was held on the merits, and in 1976 the District Court, per Judge Robert F. Peckham, found that "defendants . . . have never acted with segregative intent." *Diaz* I, App. F, A-161. The Court understood that its obligation was "to scrutinize closely the school board decision-making process to assure that false or facile justifications do not mask purposeful discrimination." *Id.* at A-151. It found that although petitioners had made decisions which maintained or did not ameliorate existing racial imbalance, these decisions were justified by a consistent and neutral adherence to a "neighborhood school policy"[6] that located

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[5]There were no pendent state claims. *Diaz v. San Jose Unified School District* (*Diaz* IV), App. C, A-51; *Diaz* III, App. D, A-94.

[6]*Id.* at A-158-161. The Court found no evidence of "attempts to gerrymander attendance boundaries or otherwise manipulate attendance areas to lock in minorities or freeze segregated school patterns." *Diaz* I, App. F. A-158. Respondents "produced no evidence of state-approved restrictive covenants, discriminatory zoning, or other racially-motivated state action shaping the demographic and ethnic makeup of the San Jose Unified School District." *Id.* at A-161.

"schools where [there were] children, so that students live 'within walking distance of the school.'" *Id.* at A-141. The Court held that in the absence of a prior constitutional violation, petitioners were under no "affirmative duty to improve ethnic balance,"[7] and hence that petitioners could in good faith "pursue other educational goals over improved ethnic balance." *Id.* at A-158. Judgment was accordingly entered for petitioners.

On appeal, a divided panel of the Ninth Circuit vacated the judgment and remanded the case in light of *Columbus Board of Education v. Penick* ("*Columbus*"), 443 U.S. 449 (1979), and *Dayton Board of Education v. Brinkman* ("*Dayton* II"), 443 U.S. 526 (1979). *Diaz v. San Jose Unified School District* ("*Diaz* II"), App. E, A-100. The Court of Appeals held that an "inference of segregative intent arose from [respondents'] proof," and that evidence of a consistent adherence to a "long established policy of neighborhood schools" could be "of slight relevancy or none at all" in rebutting this inference. *Id.* at A-105-107. In particular, the Court held that decisions to open or close schools could not "be justified by neighborhood school policies." *Ibid.*

On remand the District Court, per Judge Peckham, took as guidance this Court's holding in *Dayton* II that although "proof of foreseeable consequences is one type of quite relevant evidence of racially discriminatory purpose," such proof did not constitute "a prima facie case of purposeful racial discrimination" and did not "routinely shift[] the burden of persuasion to the defendants."[8] The District Court adopted the following constitutional standard:

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[7] *Diaz* I, App. F, A-152. No statutorily mandated "dual system" of segregated schools has ever existed in the District. *Diaz v. San Jose Unified School District* (*Diaz* II), App. E. A-100, A-101.

[8] *Diaz* III, App. D, A-60; *Dayton* II, at 536 n.9.

> The inevitability and foreseeability of racial imbalance resulting from official decisions is relevant evidence to be weighed, but it is not probative without further examination of the context of, and other evidence concerning, the actions and decisions of the officials. Inferences to be drawn from the effects of decisions must be supported by the other evidence, or there can be no finding of liability. Otherwise, the court would be holding the state officials responsible for the consequences of their decisions, rather than holding them responsible only when the court is convinced that the decisions were at least in part motivated by an improper intent or purpose. *Diaz* III, App. D, A-64-65.

Judge Peckham held that the District's adoption of a neighborhood school policy was itself motivated by a "sincere belief in its beneficial effects on the educational process and not in order to use such a policy to perpetuate segregation."[9] There was no "evidence of manipulation or bad faith in the adoption and maintenance" of the policy. *Diaz* III, App. D, A-97. Furthermore, since the objective of the neighborhood school policy was to minimize the distance between schools and the children enrolled in them, *Diaz* I, App. F, A-141, the District Court held that decisions to construct new schools "where there is a rapid increase in school age population" *Diaz* III, App. D, A-70, and to close old schools in areas of "declining enrollment" *id.* at A-74-79, were in effect, consequences of and justified by the policy.

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[9] *Id.* at A-96. The Court held that "the evidence does not suggest that the past acts of the school board have contributed significantly to the residential segregation of the attendance areas. If such had been the case, there might have been grounds for holding that the present assertion of a neighborhood school policy was designed to perpetuate segregated schools." *Ibid.*

In reaching its conclusion, the District Court carefully reviewed each school district decision which allegedly evidenced discriminatory purpose, and found that in each case the decision was made in order to serve neutral and reasonable educational goals. It therefore held that petitioners had not acted with segregative intent and entered a judgment on their behalf.

A divided panel of the Ninth Circuit affirmed the judgment, noting that the trial court had "in each instance" found "reasonable and rational explanations for" decisions having the foreseeable effect of maintaining or not ameliorating racial imbalance. *Diaz v. San Jose Unified School District* ("*Diaz* IV"), App. C, A-46. The panel held that the trial court had articulated "adequate bases . . . for all of its findings of fact." *Ibid.*

On rehearing en banc, the Ninth Circuit reversed, holding that although the trial court had "made comprehensive and accurate findings covering the significant historical facts," *Diaz v. San Jose Unified School District* ("*Diaz* V"), App. A, A-6, its "finding that the defendants acted without segregative intent was clearly erroneous."[10] *See* Fed. R. Civ. P. 52(a). The Ninth Circuit held that "where, as here, the adverse consequences [of racial imbalance] are clearly identified and repeatedly articulated to the decision-making body, the inevitability of the adverse effects provide a strong inference of illegitimate intent." *Diaz* V, App. A, A-4 n.1. This inference could not be rebutted by adherence to a neighborhood school policy, since "the location and construction of new schools and the closing of old schools are not merely decisions enforcing a neighboorhood school

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[10] *Diaz* V, App. A, A-1. The en banc Court consisted of 11 of the Ninth Circuit's 24 active judges. Judge Fletcher authored the opinion for the Court; Judges Choy, Wallace and Sneed dissented.

policy." *Id.* at A-7. Reviewing various decisions that had the effect of maintaining or intensifying racial imbalance, including the District's refusal to use busing to achieve integration, the Court ruled that "[a]n inescapable conclusion that the Board intended segregation emerges from a view of the evidence as a whole." *Id.* at A-30.

A petition for rehearing was denied on November 7, 1984. App. B, A-42.

REASONS FOR GRANTING THE WRIT

The concept of neighborhood education is deeply embedded in the practices of American schooling.[11] This is true in part because neighborhood schools have obvious advantages in terms of transportation, safety, convenience and administration. *Diaz* I, App. F, A-161. The paramount importance of neighborhood education, however, is that it reflects "the deeply felt desire of citizens for a sense of community in their public education." *Keyes v. School District No. 1*, 413 U.S. 189, 246 (1973) (Powell, J., concurring). Nevertheless, in the many contemporary metropolitan areas where de facto ethnic or racial separation exists, even-handed application of a neighborhood school policy will have the foreseeable result of producing schools that are racially imbalanced. This is true in the San Jose Unified School District.

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[11] "The neighborhood system is in wide use throughout the nation and has been for many years the basis of school administration." *Deal v. Cincinnati Board of Education*, 369 F.2d 55, 60 (6th Cir. 1966), *cert. denied*, 389 U.S. 847 (1967). The present policy of the United States is that "the neighborhood is the appropriate basis for determining public school assignments." *See* 20 U.S.C. § 1701(a)(2).

The issues raised by this case are of national importance. If permitted to stand, the legal principles enunciated in the en banc opinion of the Ninth Circuit will effectively preclude metropolitan school districts like San Jose, which have never engaged in de jure segregation, from implementing a neutral neighborhood school policy and deriving the benefits traditionally attributed to it.

The opinion below rests on legal principles which are directly contrary to the constitutional guidelines set forth by this Court in *Columbus* and *Dayton* II, and which conflict with the holdings of other federal courts of appeals.

In addition, the en banc opinion of the Ninth Circuit did not interpret and apply the "clearly erroneous" standard of Fed. R. Civ. P. 52(a) as including a duty of deference to the findings of fact of a trial court. This misinterpretation of Rule 52(a) is in conflict with the decisions of other federal courts of appeals, and, if permitted to stand, will significantly impair the orderly relationship between trial and appellate courts in the sensitive and important area of school desegregation.

I

THE DECISION BELOW IS CONTRARY TO THE HOLDINGS OF THIS COURT

The question before the trial court was whether petitioners' actions, which had the effect of perpetuating racial imbalance but which were on their face racially neutral, were motivated by segregative intent. All agree that "proof of foreseeable consequences is one type of quite relevant evidence of racially discriminatory purpose." *Dayton* II, at 536 n.9. The issue is whether proof of such foreseeability, standing alone, is sufficient to constitute a prima facie case of the segregative intent necessary to establish a constitutional violation.

In *Dayton* II, this Court specifically rejected such a position, stating:

> We have never held that as a general proposition the foreseeability of segregative consequences makes out a prima facie case of purposeful discrimination and shifts the burden of producing evidence to the defendants if they are to escape judgment; and even more clearly there is no warrant in our cases for holding that such foreseeability routinely shifts the burden of persuasion to the defendants. 443 U.S. at 536 n.9.

The Ninth Circuit, however, held that although "[p]roof that the segregative effects of a decision were foreseeable is not to be taken, as a general proposition, to make out a *prima facie* case of segregative intent," nevertheless "where, as here, the adverse consequences are clearly identified and repeatedly articulated to the decision-making body, the inevitability of the adverse effects provide a strong inference of illegitimate intent." *Diaz* V, App. A, A-4.

In plain English, the Ninth Circuit held that although foreseeable adverse consequences do not constitute a prima facie case of unconstitutional discrimination, adverse consequences that are in fact foreseen do constitute such a case. This legal principle, however, is merely an evasion of this Court's holding in *Dayton* II, since in most circumstances a reasonably competent school board will be well aware of the adverse consequences of its decisions. For example many school districts, like San Jose, face the "familiar phenomenon that in metropolitan areas minority groups are often found concentrated in one part of the city" *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 25 (1971). In such circumstances neutral application of a neighborhood school policy will have the foreseeable and foreseen effect of reflecting any de facto residential ethnic imbalance found within the school dis-

trict's boundaries. If the opinion of the Ninth Circuit is permitted to stand, it will effectively preclude the operation of a neutral neighborhood school policy in such metropolitan areas.

The Ninth Circuit's standard for finding segregative intent confuses the prima facie elements of a case of segregative intent with the elements of a violation of the affirmative duty incurred by a school district that has been shown in the past to have engaged in unconstitutional segregation. This Court, however, has sharply distinguished between these elements.

The "measure" of the affirmative duty to remedy the effects of a past constitutional violation is "the effectiveness, not the purpose, of . . . actions in decreasing or increasing the segregation caused by the dual system," *Dayton* II, 443 U.S. at 538, and for this reason violations of the duty can be established by proof that a school board has taken actions knowing that they will maintain or increase segregation. *See Dayton* II, 443 U.S. at 536 n.9. But under *Dayton* II such proof, standing alone, cannot provide a sufficient basis to support a finding of segregative intent.

The Ninth Circuit, however, supported its inference of segregative intent on the basis of its interpretation of this Court's opinion in *Columbus*. *Columbus* was read to permit a finding of segregative intent where a school board's actions have foreseeably segregative consequences, and where "the school board ha[s] been warned about the segregative consequences of its actions." *Diaz* V, App. A, A-29 n.19. *See also id.* at A-28-29 n.18. But the Ninth Circuit's interpretation of *Columbus* is profoundly at odds with *Dayton* II and is simply incorrect.

The language relied upon by the Ninth Circuit concerned the fact that " 'the *Columbus* defendants . . . were adequately put on notice of the fact that action was required

to correct and to prevent the increase in' segregation, yet failed to heed their duty to alleviate racial separation in the schools." *Columbus,* 443 U.S. at 463. It thus pertained to the "affirmative duty" of the *Columbus* defendants to remedy their prior constitutional violations by dismantling their "dual school system." *Id.* at 458-59. It did not concern the elements of a prima facie case of segregative intent.

The Ninth Circuit's confusion between the obligations of an affirmative duty to disestablish a dual school system and the legal prerequisites imposed by this Court for a finding of segregative intent is further illustrated by the Ninth Circuit's repeated references to petitioners' rejection of alternative courses of action that would have had less segregative effect than actions actually taken. For example in summarizing the essence of its holding that petitioners had acted with segregative intent, the Ninth Circuit said:

> The pattern of Board choices that consistently maintained or intensified segregation is apparent. Although many of the available alternatives would have presented an incomplete solution, each would have contributed incrementally toward reducing ethnic imbalance. In almost every instance, the Board chose to "turn toward segregation" rather than away from it. *Columbus,* 443 U.S. at 463 n.12.

Diaz V, App. A, A-30-31. *See also Diaz* V, App. A, A-8-10, A-12-13, A-19-21, A-28-29 n. 18, A-29 n.19.

The Ninth Circuit in effect drew an inference of segregative intent on the basis of petitioners' failure to choose those courses of action that would have had the least segregative impact. This inference imposed on petitioners the affirmative duty always to act so as to produce the least segregative impact, and to subordinate other educational goals to the overriding objective of reducing de facto ethnic imbalance. This duty was imposed on the San

Jose Unified School District even though it had never been established that it had engaged in purposeful segregation.

The Ninth Circuit justified imposing this affirmative duty on the basis of its reading of *Columbus*, which it once again misinterpreted. The Ninth Circuit relied upon a passage in *Columbus* in which this Court was discussing the affirmative duty to remedy the effects of a prior constitutional violation, rather than the elements of a prima facie case of segregative intent. The duty to disestablish a dual school system may well include the affirmative obligation to choose the course of action that has the least segregative consequences. But since petitioners' have never been shown to have established a dual school system, they are under no such obligation. Indeed, this Court has specifically refused to create such an affirmative obligation. *See Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976). It follows that petitioners cannot be bootstrapped into such an obligation by transforming the failure to choose the least segregative option into a prima facie case of segregative intent.

It is of great importance to maintain the distinction between the prima facie elements of a case of segregative intent, and the elements of a violation of the affirmative duty to disestablish a dual school system. In the many metropolitan school districts faced with de facto racial or ethnic imbalance, busing to create integration will always remain an "available" alternative that has less segregative consequences. If the opinion of the Ninth Circuit is permitted to stand, neutral neighborhood education will be rendered constitutionally impermissible in such districts.

II

THE DECISION BELOW WILL CONSTITUTIONALLY PROHIBIT THE OPERATION OF NEIGHBORHOOD SCHOOLS IN MANY METROPOLITAN AREAS

The situation is of course different if a school deliberately takes action knowing that it will maintain or intensify

ethnic imbalance and such action can "not 'reasonably be explained without reference to racial concerns.' "[12] *Columbus,* 443 U.S. at 461. *See Clients' Council v. Pierce,* 711 F.2d 1406, 1409 (8th Cir. 1983). In this regard, however, this Court has indicated that the neutral application of a neighborhood school policy can provide constitutional justification even for decisions that have the foreseeable effect of maintaining or intensifying ethnic imbalance. *Crawford v. Board of Education,* 458 U.S. 527, 537 n.15 (1982); *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. at 28, 31-32.

The Ninth Circuit conceded that petitioners have, "with few exceptions, adhered to [a neighborhood school] policy rigidly and refused to allow voluntary transfers for any purpose . . . ." *Diaz* V, App. A, A-6. But the Ninth Circuit ignored the implications of this concession by arbitrarily circumscribing the kinds of decisions that a neighborhood school policy can justify. With little factual, legal or policy justification, the Ninth Circuit held that a neighborhood school policy cannot provide constitutional justification for decisions regarding "the location and construction of new schools," the "closing of old schools," or the "use of portable classrooms," *Diaz* V, App. A, A-7-10.

The Ninth Circuit's holding rests upon a profound and deeply disturbing misapprehension of the definition and

[12]Thus the Fifth Circuit has concluded that:

> [i]f the acts alleged to be violative of the Constitution "have been motivated by racially and ethically bona fide concerns . . . and no showing is made that those concerns were actually subordinate to, or a subterfuge for, unconstitutional discrimination," then the fact that a particular act has a natural foreseeable disproportionate racial impact is insufficient to support a finding of discriminatory intent. . . . If, on the other hand, the challenged acts "do not have a firm basis in well accepted and historically sound non-discriminatory social policy, discriminatory intent may be inferred from the fact that those acts had foreseeable discriminatory consequences". *United States v. Texas Education Agency,* 600 F.2d 518, 528-29 (5th Cir. 1979).

application of a neighborhood school policy. The Ninth Circuit essentially held, as a matter of law, that the import of a neighborhood school policy is simply that students be required "to attend school within neighborhood attendance areas." *Diaz* V, App. A, A-7. This definition is arbitrary and wooden, and strips neighborhood education of all functional significance. In fact petitioners, like most school districts, meant something quite different by a neighborhood school policy. As the District Court found, the policy was defined with reference to the objective of serving "as many children in such a way that as many of them as possible could walk to school." *Diaz* I, App. F, A-141.

Once the neighborhood school policy is defined in this manner, it has immediate and obvious implications for decisions involving school construction, school closings, or the use of portable classrooms. It implies, for example, that school sitings must be maintained in such a manner as to minimize the distance between schools and where children reside. Thus new schools should be constructed, as the District Court found that they were, where there was "a rapid increase in school age population."[13] *Diaz* III, App. D, A-10. Since this increase occurred in the southern, suburban, Anglo sections of the District, it was unavoidable that each of nine schools constructed by the District between 1965 and 1968 opened as racially imbalanced. *See Diaz* V, App. A, A-14. The District Court found that this result, although foreseeable and foreseen, would not support an inference of segregative intent because "[i]n erecting

[13]The District Court found:

> While it is true that suspicions would be properly aroused if the district was closing schools that appeared to be becoming racially mixed and simultaneously opening new schools farthest from the area where the majority group resides, . . . (Citation omitted), there is no evidence of such manipulation in this case. Rather, the district simply responded to the needs presented by population growth. These new areas were so far from the downtown areas, and the new construction repre-

schools where the students were located, the school board followed its neighborhood school policy." *Diaz* I, App. F, A-151. However, the Ninth Circuit, with its arbitrary definition of a neighborhood school policy, viewed the foreseeable impact of the District's school construction policy as without constitutional justification and hence indicative of segregative intent. *See e.g., Diaz* V, App. A, A-8-13.

Similarly, a neighborhood school policy, if properly defined, implies that schools should be closed, as the District Court found that they were, where there were areas of declining enrollment.[14] *See Diaz* III, App. D, A-75. It so happened that student enrollment declined principally in the northern, downtown, Hispanic areas of the District, and for that reason it was foreseeable and foreseen that school closings would "maintain ethnic imbalance." *Diaz* V, App. A, A-15. The Ninth Circuit, with its myopic view of neighborhood education, construed this fact as supporting an inference of segregative intent, despite the findings of the District Court that each time a school was closed, the attendance area of the closed school was combined with "contiguous" areas "which approximated as closely as possible the concept of a neighborhood school," and that in each instance "the students of the closed school ended up in a new school which was less imbalanced than their old school." *Diaz* III, App. D, A-75.

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sented such a small percentage of the total facilities in the district, that the need for new schools did not present a very good opportunity by itself to help integrate the district. *Diaz* III, App. D, A-70-71.

[14]The District Court found that there was no evidence "that the choice of schools to close was motivated by any segregative intent. In fact, the decision to close the Wilson School and disperse its students to three neighboring schools seems to have been motivated, at least in part, by a desire to eliminate the most heavily segregated Junior High School." *Diaz* III, App. D, A-76.

The District closed 16 schools because of the legal requirements of the Field Act, Cal.Educ.Code §§ 39140 et seq. and 81130 et seq.

The inadequacy of the legal standard set forth by the Ninth Circuit can most clearly be seen in its treatment of portable classrooms. The Ninth Circuit concluded that an inference of segregative intent arose from the fact that petitioners "never used portables to improve ethnic imbalance" and "rejected numerous suggestions for portable siting to alter attendance patterns involving transferring Hispanic students from northern schools to schools further south." *Diaz* V, App. A, A-20. Yet this conclusion follows only if the District's neighborhood school policy is legally defined to be irrelevant to the use of portable classrooms,[15] since the District Court found that "the school board has used mobile units in accordance with its neighborhood school policy, to allow students to remain in their residential attendance area."[16] *Diaz* I, App. F, A-153-54.

(West 1978) which provides minimum standards for public schools to withstand earthquakes. These closings were not dictated by declining enrollment, and are discussed *infra* at p. 18.

[15]It would of course have been improper to infer segregative intent merely from petitioners' failure to use portable classrooms so as to reduce ethnic imbalance to the greatest possible extent. Such an inference would place petitioners under an affirmative duty to ameliorate de facto ethnic imbalance, and would blur the careful distinction created by this Court between de jure and de facto segregation. *See* Section I, *supra.*

[16]The District Court found:

> [T]he school district could always have opted to place new portables at the other end of the district from the area of overcrowding, and then bus the students to that end of town. But to suggest that the failure to take that extreme action indicates segregative intent seems unreasonable to this court. . . . [T]he need for portables at a particular location at either end of town was considered temporary—in the north until the new Field Act schools were constructed, in the south until bond issues were passed by the voters to build new schools to handle the growth in population. . . . [T]he decision to maintain neighborhood schools while new schools were being built, rather than sending the students temporarily across town, for dis-

As can be seen from these examples, the effect of the Ninth Circuit's opinion is to significantly undermine neighborhood education as a legitimate educational goal. Decisions relating to school construction, school closings, and the use of portable classrooms are integral to the maintenance and administration of a neighborhood school policy. Yet the Ninth Circuit's opinion prohibits school districts from relying on a neighborhood school policy to justify these decisions, leaving these decisions naked and without constitutional or educational justification. This is contrary to the holdings of other circuit courts. *See Alexander v. Youngstown Board of Education*, 675 F.2d 787, 798 (6th Cir. 1982) (school construction); *Davis v. Board of Education*, 674 F.2d 684, 688 (8th Cir. 1982) *cert. denied*, 459 U.S. 881 (1982) (school closing). If the Ninth Circuit opinion is permitted to stand, it will effectively result in the demise of the traditional neighborhood school system in the many metropolitan districts faced with de facto ethnic or racial separation.[17]

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tances which would have to be, for the most part, fairly substantial, seems to this court to be perfectly explicable for racially neutral reasons. . . . *Diaz* III, App. D, A-80-81.

[17]The Ninth Circuit further undermined the possibility of neighborhood education by holding that petitioners' use of busing within neighborhood attendance areas created an inference of segregative intent with respect to the petitioners' refusal to use cross-town busing in order to achieve integration. *Diaz* V, App. A, A-18, 29. The District Court found that although "approximately one-third" of the District's students were bused within attendance areas,

> except for transportation to special schools and programs, there was no evidence that there is or has ever been any busing outside of the attendance areas, which have not been shown to have been established or gerrymandered in any way that suggests segregative intent. Nor was there any evidence

III

THE OPINION BELOW MISINTERPRETED THE "CLEARLY ERRONEOUS" RULE OF FED. R. CIV. P. 52(a) IN SUCH A MANNER AS TO IMPAIR SIGNIFICANTLY THE ORDERLY RELATIONSHIP BETWEEN TRIAL AND APPELLATE COURTS IN THE IMPORTANT AND SENSITIVE AREA OF SCHOOL DESEGREGATION

The District Court's conclusion that petitioners had acted without segregative intent was a finding of fact, and under

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introduced showing that students could have been bussed equivalent distances to a more integrative setting. . . . There is no evidence . . . suggesting that the school officials . . . did not strive for the best approximation of the "walking distance" ideal. . . . Nor was there any evidence offered which suggested that the distances from school ever became so great that the underlying benefits deriving from a neighborhood school policy and the decentralization it allows—other than the ability to walk to school—were ever threatened or eliminated. *Diaz* III, App. D, A-82-83.

The Ninth Circuit nevertheless held that "[t]he Board's use of buses for every purpose but integration, coupled with the intransigent resistance to the use of buses for integration supports an inference of segregative intent." *Diaz* V, App. A, A-18. The Ninth Circuit rested its conclusion on *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), which it interpreted to mean that treating busing for purposes of integration differently than busing for other purposes was constitutionally invalid. *Diaz* V, App. A, A-18, A-29. But this is a misreading of *Seattle*, which concerns only the situation where the "political process or the decision making mechanism" for integrative busing has been uniquely altered. 458 U.S. at 485. There was no such improper alteration of the political process in this case. Since financial limitations will render the ideal of "walking distance" merely aspirational in most major metropolitan school districts, the holding of the Ninth Circuit will permit an inference of segregative intent in virtually all such cases, despite the fact that refusal to bus long distances to achieve integration is simply the outgrowth of a legitimate neighborhood school policy.

Fed. R. Civ. P. 52(a) it could be set aside on appeal only if "clearly erroneous." *Pullman-Standard v. Swint*, 456 U.S. 273, 289-90 (1982). The "clearly erroneous" standard of Rule 52(a) is intended to establish an orderly relationship between appellate and trial courts, in which factual findings are made in the first instance by the court most familiar with the evidence, and in which litigants are not rewarded simply because they have the financial resources or perseverance to appeal. *See* Wright, *The Doubtful Omniscience of Appellate Courts*, 41 Minn. L. Rev. 751, 771, 778-82 (1957). The underlying policies of the "clearly erroneous" standard thus require appellate "deference" to a trial court's findings of fact. *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 855 (1982). These findings may not be reversed as plainly erroneous merely because an appellate court "might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the district court apparently deemed innocent." *United States v. National Ass'n of Real Estate Boards*, 339 U.S. 485, 495 (1950).

The "clearly erroneous" standard is of particular importance in the sensitive area of school desegregation. Findings of fact concerning the existence *vel non* of segregative intent entail complex and difficult issues of judgment that involve a "multiplicity of factual elements, with their various combinations," and are ultimately based upon "the application of the fact-finding tribunal's experience with the mainsprings of human conduct to the totality of the facts of each case." *Commissioner v. Duberstein*, 363 U.S. 278, 289 (1960). Because of the scope and complexity of such findings, appellate courts may easily dilute the deference that should be given to the trial court's determinations. For this reason, appellate review of such findings should be especially "restricted." *Id.* at 290. *See Rogers v. Lodge*, 458 U.S. 613, 622 (1982). Accordingly, courts of appeals have shown "great deference to . . . district court's findings in school desegregation cases," and have refrained from re-

versing findings as plainly erroneous if "there is sufficient evidence to support the findings of the district court." *Goldsboro City Board of Education v. Wayne County Board of Education*, 745 F.2d 324, 327 (4th Cir. 1984). *See Alexander v. Youngstown Board of Education*, 675 F.2d at 796-801.

The dangers of a contrary approach are well illustrated by this case, in which the Ninth Circuit interpreted Rule 52(a) as imposing no requirement of deference toward trial court findings of fact, and as authorizing revision of such findings whenever an appellate court has the "firm conviction that a mistake had been committed."[18] *Diaz* V, App. A, A-6, 31. Analysis of the Ninth Circuit's opinion, however, demonstrates not only the wisdom of Rule 52(a)'s policy of entrusting findings of fact in the first instance to the trial court, but also the importance of requiring appellate deference to these findings.

A. THE OPINION BELOW IGNORED PERTINENT AND SPECIFIC FINDINGS OF THE DISTRICT COURT

This Court has recognized that a determination of discriminatory purpose, entails "a sensitive inquiry into such circumstantial and direct evidence of intent as may be avail-

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[18]The Ninth Circuit's opinion fails to mention any responsibility to defer to a trial court's factual findings. The opinion is instead manifestly predicated on the assumption that an appellate court is empowered to revise such findings if only it has a sufficiently firm belief that the case should be viewed differently. The Ninth Circuit defended this assumption by citing *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948), in which this Court said that "[a] finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed." The "firm conviction" to which this Court referred, however, was never meant to be attained in the absence of a proper deference to trial court findings of fact. *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. at 855.

able." *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 266 (1977). This inquiry requires a thorough mastery of the entire record of a case, which in school desegregation cases tends to be rather large and complex.[19] The policy of Rule 52(a) is in part based upon the assumption that since trial courts are more familiar with the record than appellate courts, a court of appeals should be especially careful before reversing a trial court's findings. *See Columbus Board of Education v. Penick*, 443 U.S. 449, 471 (1979) (Stewart, J., concurring). The correctness of this assumption is confirmed by the opinion below, in which the Ninth Circuit repeatedly leapt to conclusions that were either unjustifiable in light of all the evidence, or that were actually negated by specific findings of the District Court.

For example, the Ninth Circuit in its opinion discussed at some length petitioners' closing of certain schools which the Field Act required to be shut down because they were structurally inadequate to meet the stress of an earthquake.[20] In rebuilding these schools the District had chosen to retain original attendance areas, despite the foreseeable result that most of these schools would re-open as ethnically imbalanced, and despite existence of alternatives that would marginally have reduced the imbalance. *Diaz* I, App. F, A-122-24; *Diaz* III, App. D, A-71-72. After examining these facts, the trial court found no evidence of segregative intent, but in its en banc opinion the Ninth Circuit disagreed. *Compare Diaz* III, App. D, A-71-74 *with Diaz* V, App. A, A-122-27.

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[19]In this case the trial lasted 11 days. The trial transcript runs to 1,405 pages, together with some 100 multi-part exhibits which together comprise over 1,600 pages of written material.

[20]*See* note 14 *supra*.

Since it would have been constitutionally improper for the Ninth Circuit to infer segregatve intent merely from the foreseeable results of petitioners' actions, even if these results could have been avoided by available alternatives, the Court of Appeals must have based its conclusion on its perception that there was no legitimate educational justification for petitioners' decisions. But, the trial court in fact had made an important and specific finding regarding the educational justification for the siting of these schools. The trial court had expressly found that petitioners' decisions were responsive to "the demand of local parents," and in particular to the pressure "of the Spanish-surnamed community" which "was concerned that it would lose its neighborhood schools." *Diaz* I, App. F, A-124; *Diaz* III, App. D, A-72-73. This finding was not disturbed on appeal, and it provides a legitimate and powerful educational rationale for petitioners' decisions. The Ninth Circuit's failure to take account of this finding is a disturbing indication of its incomplete grasp of this record, a flaw which might perhaps have been corrected had the Court of Appeals exercised the restraint and deference required by Rule 52(a).[21]

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[21]Another example of the Ninth Circuit's unfamiliarity with the record occurred in its discussion of petitioners' admission at trial that Spanish-surnamed faculty and staff had been intentionally assigned to downtown, Hispanic, schools. The trial court found that although the evidence did not permit such assignments to be justified by reference to a racially neutral policy of assigning Spanish-speaking faculty and staff (whether Hispanic or Anglo) to schools with a disproportionate number of Hispanic students, the assignments were in fact motivated by the "benign purposes" of "providing role models for the students," and hence that the assignments could not be used "as support for inferring segregative intent from any of the school officials' other acts which had the foreseeable effect of perpetuating racial imbalance in the schools." *Diaz* III, App. D, A 92-93. The Ninth Circuit took a different view, holding that there was an "inference of racial bias" because the "Board

B. THE OPINION BELOW DID NOT DEFER TO THE FINDINGS OF THE DISTRICT COURT AS REQUIRED BY RULE 52(a)

The Ninth Circuit recognized that the trial court had made "comprehensive and accurate findings covering the significant historical facts." *Diaz* V, App. A, A-6. In holding that petitioners' had acted with segregative intent, however, the Ninth Circuit simply chose to give these historical facts "a more sinister cast" than had the District Court and by so doing violated the principal of deference which is at the core of Rule 52(a).[22] *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. at 855; *Columbus Board of Education v. Penick*, 443 U.S. at 468 (Burger, C.J., concurring); *Zenith Corp. v. Hazeltine*, 395 U.S. 100, 123 (1969). The Ninth Circuit's approach was thus to ask whether, in the first instance, "it would have made the findings the trial court did." *Zenith Corp. v. Hazeltine*, 395 U.S. at 123.

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assigned faculty and staff on the basis of ethnic origin without any plausible neutral justification." *Diaz* V, App. A, A-19-20, A-30. In reaching this conclusion, however, the Ninth Circuit simply overlooked the trial court's specific finding, made after the opportunity to observe at first hand the demeanor and testimony of petitioners' witnesses, that petitioners' assignments were motivated by "benign purposes." The Ninth Circuit's application of the "plainly erroneous" standard was thus deeply flawed by an inadequate comprehension of the record.

[22]The Ninth Circuit's refusal to defer to the findings of the trial court is particularly unjustified in this case. It is not as if the Ninth Circuit had any reason to believe that Chief Judge Peckham was incapable of perceiving "sinister" motives where they exist, or that he was inexperienced, or naive, or reluctant to make findings of segregative intent. *See, e.g., Larry P. v. Riles*, 495 F. Supp. 926, 932-33, 975-86 (N.D. Cal. 1979); *EEOC v. Pacific Southwest Airlines*, 587 F. Supp. 686 (N.D. Cal. 1984); *Officers for Justice v. Civil Service Commission*, 20 F.E.P. Cases 1304, 1305 n.1 (N.D. Cal. 1977).

A striking example of this lack of deference occurred in the Ninth Circuit's discussion of certain statements made by the District's Board of Education during an election on a proposed bond issue designed to finance the construction of schools to replace those which the Field Act required to be closed.[23] These schools were located in the northern, Hispanic areas of the District. During the elections, the Board made statements which the Ninth Circuit interpreted to mean that "if the public did not vote for the bond issue, busing would result. If it did vote for the issue, no busing would result." *Diaz* V, App. A, A-27. The District Court found that these statements were "simply realistic factual statements of the results which would flow from the failure of the bond issues to pass," and that they therefore did not constitute evidence of segregative intent.[24] *Diaz* III, App. D, A-87-88. The Ninth Circuit found this conclusion to be plainly erroneous, holding that the statements "compel an inference of segregative intent." *Diaz* V, App. A, A-28. Perhaps these differing conclusions can be explained by the fact that the trial court was aware, as the Ninth Circuit evidently was not, that the District's neighborhood school policy had support in both the Anglo *and* Hispanic communities[25] and that it was thus overly simplistic to interpret petitioners' appeal to preserve neighborhood education as simply catering "to a pro-segregation public." *Diaz* V, App. A, A-27. But regardless of the ultimate accuracy of the District Court's finding, it is clear that the Ninth Circuit gave it no deference, and found it to be plainly erroneous only because it chose to give a "more sinister cast to actions which the district court

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[23] *Diaz* I, App. F, A-154-55; *see* note 14 *supra*.

[24] The District Court found that there was "no particular emphasis given to" these statements, and that "in context" there was no "suggestion that the school board meant to do anything but point to the many burdens which would be placed on the students and the district in general by such a failure. . . ." *Diaz* III, App. D, A-88.

[25] *See* Section III (A), *supra*.

. . . deemed innocent." *United States v. National Ass'n of Real Estate Boards,* 339 U.S. at 495.

Another example of this improper application of the "plainly erroneous" standard concerns the trial court's finding that petitioners' failure to comply with their affirmative duty under California law to integrate was not "evidence of segregative intent." *Diaz* I, App. F, A-158. The Ninth Circuit disagreed, holding that petitioners' failure suggests that, they were "motivated, at least in part, by a desire to avoid desegregation rather than a sincere commitment to the educational benefits of neighborhood schools." *Diaz* V, App. A, A-13. As a matter of logic, of course, petitioners' refusal to comply with their affirmative duty could stem *either* from a bona-fide, but perhaps unduly "stubborn adherence" to the virtues of neighborhood education, *Diaz* V, App. A, A-13 *or* from segregative intent. The Ninth Circuit chose to find the latter; the District Court, closer to the facts of the case and able to observe at first hand the demeanor and "evaluate the credibility" of petitioners' witnesses, chose to find the former. *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. at 855. The point, however, is that the Ninth Circuit gave no deference to the District Court's determination, choosing instead to arrogate to itself the power to "substitute its interpretation of the evidence for that of the trial court." *Id.* at 857.

In the end, therefore, the Ninth Circuit's lack of deference to the District Court rewarded respondents for persistently prosecuting their appeal until they encountered judges who shared their view of the case. That is not a recipe for an orderly relationship between trial and appellate courts, for it communicates to litigants that there is nothing presumptively correct about a trial court's findings of fact. It is in essence an invitation to litigants to appeal, and to keep appealing until their (or their opponents') resources

are exhausted. The standard of the Ninth Circuit, if permitted to stand, will have the most unfortunate consequences in the sensitive and important area of school desegregation, for it will turn these cases into political footballs, to be kicked from trial to appellate courts and back again.

CONCLUSION

The issues posed by this case are of great importance; they are well-focused and cleanly presented. For the reasons stated in this petition, petitioners respectfully request that a writ of certiorari issue to review and ultimately to reverse the judgment of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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84-1417

No. A-543

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1984

SAN JOSE UNIFIED SCHOOL DISTRICT, CHARLES KNIGHT, individually and as District Superintendent of the San Jose Unified School District; NEIL H. GEIER, JR., ELIZABETH J. ALLEN, EDWIN P. JONES, JR., MARY K. McCREATH, and DONALD L. RAIMONDI, individually and as members of the Board of Education of the San Jose Unified School District,
Petitioners,

vs.

ARNULFO M. DIAZ and SOCORRO DIAZ, as the parents and next friends of FERNANDO DIAZ, MIQUEL A. DIAZ and JUAN F. DIAZ; JOSE VASQUEZ, as the parent and next friend of DAVID VASQUEZ, individually and on behalf of all other persons similarly situated,
Respondents.

On Certiorari to the United States Court of Appeals For The Ninth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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INDEX TO APPENDICES

APPENDIX A

Diaz v. San Jose Unified School District, 733 F.2d 660 (9th Cir. 1984) ..... (A-1)-(A-41)

APPENDIX B

Diaz v. San Jose Unified School District, No. 81-4434 (9th Cir. Nov. 7, 1984) (order denying petition for rehearing) A-42

APPENDIX C

Diaz v. San Jose Unified School District, 705 F.2d 1129 (9th Cir. 1983) ..... (A-43)-(A-56)

APPENDIX D

Diaz v. San Jose Unified School District, 518 F. Supp. 622 (N.D. Cal. 1981) ..... (A-57)-(A-99)

APPENDIX E

Diaz v. San Jose Unified School District, 612 F.2d 411 (9th Cir. 1979) ..... (A-100)-(A-109)

APPENDIX F

Diaz v. San Jose Unified School District, 412 F. Supp. 310 (N.D. Cal. 1976) ..... (A-110)-(A-162)

APPENDIX G

Map of the San Jose Unified School District A-163

APPENDIX H

San Jose Unified School District v. Diaz, No. A-543 (U.S. Jan. 16, 1985) (order extending time to file petition for writ of certiorari) A-164

Appendix A

Arnulfo M. DIAZ and Socorro Diaz, as the parents and next friends of Fernando Diaz, Miguel A. Diaz and Juan F. Diaz; Jose Vasquez, as the parent and next friend of David Vasquez, individually and on behalf of all other persons similarly situated. Plaintiffs-Appellants.

v.

SAN JOSE UNIFIED SCHOOL DISTRICT, Charles Knight, individually and as District Superintendent of the San Jose Unified School District; Neil H. Geier, Jr., Elizabeth J. Allen, Edwin P. Jones, Jr., Mary K. McCreath, and Donald L. Raimondi, individually and as members of the Board of Education of the San Jose Unified School District, Defendants-Appellees.

No. 81-4434.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Dec. 12, 1983.

Decided May 17, 1984.

Before BROWNING, Chief Judge, and CHOY, WALLACE, SNEED, TANG, SCHROEDER, FLETCHER, ALARCON, FERGUSON, NELSON and BOOCHEVER, Circuit Judges.

FLETCHER, Circuit Judge:

Plaintiffs, parents of all Spanish-surnamed children attending school in the San Jose Unified School District (the District), appeal the district court's ruling that the District did not act with segregative intent in maintaining ethnically imbalanced schools. After a careful review of the record, we conclude that the district court's finding that the defendants acted without segregative intent was clearly erroneous. Accordingly, we reverse.

I. BACKGROUND

The Board of Education of the San Jose Unified School District (the Board) has been aware since at least 1962 that its schools are segregated. The district is long and narrow: about sixteen miles long and from one and one-half to four miles wide. Hispanics are concentrated in the northern downtown area while the southern, suburban neighborhoods are largely Anglo. In 1973, Spanish-surnamed students made up 24.6 percent of the population of the district. In the southern schools, only .07 percent of the students were Spanish-surnamed, while in the northern schools 78.8 percent were Spanish-surnamed. State law requires the Board to take affirmative steps to desegregate its schools. The Board made repeated announcements endorsing the concept of desegregation. Nonetheless, between 1962 and 1973, the school board did nothing to alleviate the imbalance. Indeed, the Board took many steps that maintained segregation and rejected available, less segregative courses of action.

In 1971, the plaintiffs filed a class action on behalf of all Spanish-surnamed students enrolled in the District and their parents. The complaint charged that defendants were operating a segregated public school system in violation of the Fourteenth Amendment and sought desegregation of the school district. After trial to the court, the district court found that the school district was racially imbalanced and that defendants had maintained the imbalance. The court, however, denied remedial relief because it decided that defendants had acted without segregative intent. *Diaz v. San Jose Unified School District,* 412 F.Supp. 310 (N.D.Cal.1976) (*Diaz I*).

On appeal, this court vacated and remanded for reconsideration. *Diaz v. San Jose Unified School District,* 612 F.2d 411, 416 (9th Cir. 1979) (*Diaz II*). We found that "[a]n inference of segregative intent arose from the appellants' proof," *Id.* at 415. The district court had, however, impermissibly concluded that the school district's racially neutral

neighborhood school policy "constituted either a complete defense to a charge of segregative intent, or, completely dispelled the inference of segregative intent, that flowed from the appellants' proof." *Id.* We held that "[s]trict adherence to a neighborhood policy is no more than circumstantial evidence that bears upon the existence or non-existence of segregative intent. The existence of such a policy is not enough to prove the absence of segregative intent." *Id* at 416.

On remand, the district court required rebriefing and argument but took no new evidence. Once again, the court found the evidence insufficient to support a finding of segregative intent, holding that "the adherence to a neighborhood school policy by the school officials in the [San Jose Unified School District] was not a device for maintenance of segregated schools, although that effect was clearly foreseeable and was clearly foreseen by the school officials." *Diaz v. San Jose Unified School District,* 518 F.Supp. 622, 644 (N.D.Cal.1981) (*Diaz III*). Plaintiffs appeal.

II. DISCUSSION

A. *The Need to Prove Segregative Intent*

The Board admits that it has maintained ethnically imbalanced schools and has omitted courses of action that would have reduced that imbalance. Plaintiffs presented overwhelming evidence that the Board's actions "knowingly perpetuated ethnic imbalance in the schools." *Diaz III,* 518 F.Supp. at 642. Nonetheless, *de facto* segregation in the schools does not, without more, prove a violation of the Fourteenth Amendment. The plaintiffs must prove not only that the defendants' actions created or maintained racial or ethnic imbalance in the schools, but also that those actions were motivated by segregative intent. *See Keyes v. School District No. 1,* 413 U.S. 189, 208, 93 S.Ct. 2686, 2697, 37 L.Ed.2d 548 (1973); *Diaz I,* 412 F.Supp. at 328-29.

Ordinarily, only circumstantial evidence is available to establish segregative intent. Evidence of the discriminatory impact of decisions is one sort of circumstantial evidence supporting an inference of a segregative intent.

> The impact of the official action—whether it "bears more heavily on one race than another" . . .—may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face.

Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266, 97 S.Ct. 555, 564, 50 L.Ed.2d 450 (1977). Proof that the segregative effects of a decision were foreseeable is not to be taken, as a general proposition, to make out a *prima facie* case of segregative intent, nor does it routinely shift the burden of persuasion to the defendants. *See Dayton Board of Education v. Brinkman,* 443 U.S. 526, 536 n. 9, 99 S.Ct. 2971, 2978 n. 9, 61 L.Ed.2d 720 (1979) (*Dayton*). Nonetheless, "proof of foreseeable consequences is one type of quite relevant evidence of racially discriminatory purpose. . . ." *Id. See also Columbus Board of Education v. Penick,* 443 U.S. 449, 464-65, 99 S.Ct. 2941, 2949-50, 61 L.Ed.2d 666 (1979) (*Columbus*).[1] Other circumstantial

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[1]Indeed, where, as here, the adverse consequences are clearly identified and repeatedly articulated to the decisionmaking body, the inevitability of the adverse effects provide a strong inference of illegitimate intent. *See Personnel Administrator of Massachusetts v. Feeney,* 442 U.S. 256, 279 n. 25, 99 S.Ct. 2282, 2296 n. 25, 60 L.Ed.2d 870 (1979), *Columbus Board of Education v. Penick,* 443 U.S. 449, 462 n. 11, 463 n. 12, 99 S.Ct. 2941, 2949 n. 11, 2949 n. 12, 61 L.Ed.2d 666 (1979).

We recognize the special difficulty inherent in determining the "intent" of any deliberative body such as a school board: It is "'extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment' . . . . Whatever difficulties exist with regard to a single statute will be compounded in a judicial review of years of admin-

evidence relevant to the proof of segregative intent includes the historical background and specific sequence of events leading up to the Board's actions maintaining or exacerbating ethnic imbalance in district schools. *See Arlington Heights,* 429 U.S. at 267-68, 97 S.Ct. at 564-65. We will focus our review on these latter aspects of the proof, for the defendants concede that they knowingly perpetuated segregation.

B. *Standard of Review*

We examine the district court's findings of fact and its ultimate conclusion as to the Board's intent under the clearly erroneous standard:

> discriminatory intent is a finding of fact to be made by the trial court. . . . [It] means actual motive; it is not a legal presumption to be drawn from a factual showing of something less than actual motive. Thus, a court of appeals may only reverse a district court's finding on discriminatory intent if it concludes that the finding is clearly erroneous under Rule 52(a).

Pullman-Standard v. Swint, 456 U.S. 273, 289-90, 102 S.Ct. 1781, 1790-91, 72 L.Ed.2d 66(1982). *Accord Dayton,* 443 U.S. at 534, 99 S.Ct. at 2977; *Columbus,* 443 U.S. at 468, 99 S.Ct. at 2952 (1979) (Burger, C.J., concurring).

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istration of a large and complex school system." *Keyes v. School District No. 1,* 413 U.S. 189, 233-34, 93 S.Ct. 2686, 2710, 37 L.Ed.2d 548 (1973) (Powell J., concurring and dissenting) (quoting *Palmer v. Thompson,* 403 U.S. 217, 224, 91 S.Ct. 1940, 1944, 29 L.Ed.2d 438 (1971)).

The difficulty is exacerbated in this case by the fact that the courts must use objective and circumstantial evidence to prove a subjective factor—motivation or purpose to discriminate. Discriminatory purpose, "implies more than intent as violation or intent as awareness of consequences. . . . It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Feeney,* 442 U.S. at 279, 99 S.Ct. at 2296 (1979).

Under this standard the district court's factual finding of lack of segregative intent may be set aside only if, "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948); *Anti-Monopoly, Inc. v. General Mills Fun Group, Inc.*, 684 F.2d 1316, 1318 (9th Cir.1982).

In this case our careful review of the record leaves us with a firm conviction. The district court has made comprehensive and accurate findings covering the significant historical facts, but we are firmly convinced that it erred when it reached the ultimate conclusion that these facts do not compel a finding of segregative intent.

C. The Neighborhood School Policy

The significance of the Board's adherence to a "neighborhood school policy" was central to the district court's analysis. This policy requires students to attend the schools nearest their homes. The Board has, with few exceptions, adhered to this policy rigidly and refused to allow voluntary transfers for any purpose, including voluntary desegregation.[2] Although a neighborhood school policy has been

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[2]In following this policy, the Board acted in violation of California law, which prohibited adherence to a neighborhood school policy when neighborhoods were segregated. The California Supreme Court states,

> although a school board's establishment of and adherence to a "neighborhood school policy" may on its face represent the implementation of a "neutral," constitutionally permissible classification scheme, the effect of such state action has invariably been to inflict a "racially specific" harm on minority students when such a policy actually results in segregated education.

Crawford v. Board of Education of the City of Los Angeles, 17 Cal.3d 280, 294, 130 Cal.Rptr. 724, 551 P.2d 28 (1976).

used by school districts to justify segregation, *see Dayton*, 443 U.S. at 533 n. 7, 99 S.Ct. at 2976 n. 7; *Columbus*, 443 U.S. at 461-62 & n. 8, 99 S.Ct. at 2948-49 & n. 8; *Keyes*, 413 U.S. at 206, 93 S.Ct. at 2696, adherence to such a policy is not by itself dispositive of segregative intent. We recognized in our previous opinion that the neighborhood school policy "is merely relevant evidence to be taken into account in deciding whether the forbidden intent did or did not exist." *Diaz II*, 612 F.2d at 415. It "does not have constitutional implications one way or the other without a penetrating examination of the complete context in which the neighborhood policy was initially applied and subsequently enforced." *Id.*

We must distinguish, however, between a policy requiring students to attend schools within neighborhood attendance areas, and the decision to draw those attendance areas in a manner that achieves or maintains ethnic imbalance. School buildings are large, immobile objects. For many school districts, the location of existing schools will more or less determine feasible attendance areas. Where neighborhoods are themselves racially or ethnically imbalanced, the enforcement of a neighborhood school policy may perpetuate *de facto* segregation. As we read the Supreme Court's pronouncements we cannot require a school district with no history of *de jure* segregation to abandon its neighborhood school policy merely because the infeasibility of relocating its schools has causeed the entrenchment of segregation. *See, e.g., Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 28, 9 S.Ct. 1267, 1282, 28 L.Ed.2d 554 (1971). As we explained in our previous opinion, however, the location and construction of new schools and the closing of old schools are not merely decisions enforcing a neighborhood school policy. Rather, they are decisions that may determine whether the prescribed neighborhood attendance areas will be integrated

or segregated. *See Diaz II*, 612 F.2d at 415. The Supreme Court has recognized that

> [i]n the past, choices in this respect have been used as a potent weapon for creating or maintaining a state-segregated school system. In addition to the classic pattern of building schools specifically intended for Negro or white students, school authorities have sometimes, since *Brown* [*v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954)], closed schools which appeared likely to become racially mixed through changes in neighborhood residential patterns. This was sometimes accompanied by building new schools in the areas of white suburban expansion farthest from Negro population centers in order to maintain the separation of the races with a minimum departure from the formal principles of "neighborhood zoning".

Swann, 402 U.S. at 21, 91 S.Ct. at 1278. A school district may combine its neighborhood school policy with a segregative pattern of site selection. In such cases, the enforcement of a neighborhood school policy may be one of a series of segregative acts independently evincing segregative intent. Many of these same actions disapproved by the Supreme Court in *Swann* are also present in this case.

Furthermore, adherence to a neighborhood school policy may have a reciprocal effect by making neighborhoods more segregated.

> The construction of new schools and the closing of old ones . . . when combined with one technique or another of student assignment, will determine the racial composition of the student body in each school in the system. Over the long run, the consequences of the choices will be far reaching. People gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the pattern of residential development of a metropoli-

> tan area and have important impact on composition of inner-city neighborhoods.

Id. at 20-21, 91 S.Ct. at 1278.

In this case, a series of events unrelated to the ethnic imbalance of the District's schools required the Board to make a large number of choices relating to school siting, school construction, the use of portable classrooms and the definition or redefinition of neighborhood attendance areas. Each time, parents, interested organizations and the State of California presented alternative proposals to the Board that could have ameliorated the segregation in the district schools. Most of these opportunities presented no threat to the neighborhood school policy and could have been accomplished within its framework. The Board consistently selected the more segregative alternative.

D. *Board Awareness of Segregation and its Duty to Desegregate*

Throughout the period in question the Board was aware of ethnic imbalance in the district schools.[8] The Board was

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[8]The first "official" recognition of imbalance in the schools came in 1962 when the Board passed a motion recognizing the problem of ethnic imbalance in the schools, and promising to take action on the subject. On January 17, 1963, the Board passed a resolution recognizing that "segregation of racial and ethnic minority group children . . . contain[s] inherent educational disadvantages for minority group children, which in turn are a root cause of social evils affecting the entire community life." Furthermore, the Board recognized that segregation is potentially aggravated by the drawing of school boundaries" and resolved to undertake a "comprehensive study . . . with the aim of overcoming the evils produced by such school segregation . . . ." In 1964, the Board conducted its first ethnic survey of the schools in the district. This survey confirmed what the Board had recognized two years earlier—that the schools in the district were substantially imbalanced. In a 1966 report to the State Department of Education the Board recognized that the District's efforts to solve the problem of segregation in the schools were not meeting the State's guidelines, which required "that proj-

also continuously aware that it had an affirmative duty to desegregate under state law.[4]

In 1963, the California Supreme Court held that:

> even in the absence of gerrymandering or other affirmative discriminatory conduct by a school board, a student under some circumstances would be entitled to relief where, by reason of residential segregation, substantial racial imbalance exists in his school. . . . [w]*here such segregation exists, it is not enough for a school board to refrain from affimative discriminatory conduct. The harmful influence on the children will be reflected and intensified in the classroom if school attendance is determined on a geographic basis without corrective measures.* The right to an equal opportunity for education and the harmful consequences of segregation require that school boards take steps, insofar as reasonably feasible, to alleviate racial imbalance in schools regardless of its cause. Our State Board of Education has adopted regulations which encourage transfers to avoid and eliminate racial segregation (Cal. Admin.Code, Title 5, §§ 2010, 2011) . . .

Jackson v. Pasadena City School District, 59 Cal.2d 876, 881, 31 Cal.Rptr. 606, 382 P.2d 878 (1963) (emphasis added).

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ect proposals necessarily incorporate activities to alleviate situations where segregation existed." In June, 1966, a consultant in the State Office of Compensatory Education stressed the suggestion of "exchange busing" as a means of alleviating the racial imbalance. In 1968, the State Department of Education advised the Board that 41 of its 50 schools were racially imbalanced by state standards.

[4]In April, 1967, the State Board of Education sent a letter to all district superintendents informing them that State law required affirmative steps to reduce segregation in the schools, regardless of cause, citing Cal.Admin.Code, Title 5, § 2010, 2011 and the decision of the California Supreme Court in *Jackson v. Pasadena School District*, 59 Cal.2d 876, 31 Cal.Rptr. 606, 382 P.2d 878 (1963). A letter from the State Department of Education of June 21, 1968, reiterated the mandate of its 1967 letter, informing the District of its duty to desegregate. *See also infra* note 9.

In 1976, the California Supreme Court reapproved the *Jackson* holding, recognizing that "for more than a decade this court has adhered to the position that school boards in this state bear a constitutional obligation to attempt to alleviate school segregation, regardless of its cause." *Crawford v. Board of Education of the City of Los Angeles,* 17 Cal.3d 280, 293, 130 Cal.Rptr. 724, 551 P.2d 28 (1976). The California courts throughout the period consistently had reiterated this obligation of local school boards. *See Crawford,* 17 Cal.3d at 291-92, 130 Cal.Rptr. 724, 551 P.2d 28 (citing *Mulkey v. Reitman,* 64 Cal.2d 529, 537, 50 Cal.Rptr. 881, 413 P.2d 825 (1966); *San Francisco Unified School District v. Johnson,* 3 Cal.3d 937, 957-58, 92 Cal.Rptr. 309, 479 P.2d 669 (1971); *Serrano v. Priest,* 5 Cal.3d 584, 96 Cal. Rptr. 601, 487 P.2d (1971)). The district court was clearly erroneous in its finding that the Board's obligations under state law were in a constant flux. *See Diaz I,* 412 F.Supp. at 334; *Diaz III,* 518 F.Supp. at 642 (incorporating findings of Diaz I). The obligations were clear and the Board was aware of them.[5]

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[5]Although the district court accurately outlined the changes in the state guidelines, *see Diaz I,* 412 F.Supp. at 327-28, the policies exemplified by those provisions are remarkably consistent through 1972. The district court cited several examples of the Board's knowing failure to comply with state requirements. *See Diaz I* at 328. The court found that "the board *understood* the statutory obligation to conduct studies and formulate alternate plans designed toward reducing ethnic imbalance . . . ." *Id.* (emphasis added). However, the court found, "the board has never directed its staff to formulate alternative criteria for student assignment or to prepare a plan. . . ." *Id.*

The court found that the district "advised the State Department of Education of progress toward integration through the QUEST study . . ." *Id.* However, the board limited the scope of the study [and] . . . [n]o action was taken on any QUEST proposal." *Id.*

The court found that "school districts were required to consider the impact of site selection on ethnic composition of existing schools. . . ." *Id.* However, the court found that "the district has not applied the state's checklist for improved ethnic balance" in siting the Anglo schools. *Id.*

Yet, during this period, the Board resisted compliance with state requirements that affirmative action be taken to desegregate its schools. In a 1966 report to the State Department of Education, the Board recognized that it was not meeting the State's guidelines. The Board acknowledged that it had been subject to "considerable pressure" to alter its neighborhood school policy,[6] and stated in the report:

District representatives were informed that the State Board of Education felt it had a "mandate" to expedite integration in all schools; that social integration of all pupils carried the *highest priority,* regardless; that the traditional neighborhood school concept was no longer valid in districts characterized by "racial imbalance," and that the subsequent year's projects (1967-68) would be *required* to "focus" on intergroup experiences and the general problem of *de facto* segregation in order to be approved for funding. (emphasis in original).

Despite its recognized duty to take affirmative steps to desegregate, the Board continued to justify actions that

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[6]In 1968 the Santa Clara County Office of Education issued a report entitled "Improving Ethnic Balance and Intergroup Relations," prepared by Edwin T. Rios, a consultant hired by the County.

This report recommended two-way busing to relieve ethnic imbalance, as well as revision in curriculum, staff, training and community relations. The report recognizes and stresses that under state laws at that time "school districts have a legal obligation to take reasonable affirmative steps to prevent the segregation of students in schools by race, *regardless* of the cause of segregation, and to consider the ethnic composition of a school in determining its attendance boundaries."

On February 3, 1969, Superintendent Downing sent a letter to the Board discussing the Rios report and recommending the formation of a citizen's committee to study the problem of ethnic imbalance and make recommendations for solving the problem. He stated that "the school system must reinforce its efforts to provide for all students high quality integrated education. The district

maintained segregation by reference to its neighborhood school policy. The Board's stubborn adherence to this policy in the face of clearly established state law holding desegregation to be a matter of overriding educational importance suggests that the Board was motivated, at least in part, by a desire to avoid desegregation rather than a sincere commitment to the educational benefits of neighborhood schools.[7]

E. *School Siting and Transportation*

Despite the Board's awareness of the problem of ethnic imbalance and its duty to alleviate it, the Board chose alternatives that perpetuated or intensified segregation and rejected numerous unusual opportunities to reduce segregation that became available throughout the years.

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must avail itself of every avenue of approach in order to achieve this objective." Downing further stated,

> The San Jose Unified School District, one of the largest in the county, has a heavy concentration of Mexican-American students. A racial-ethnic survey conducted in October of 1968 reports that 9,834 or 27.9% of the student population is Mexican-American. Of this number 7,226 are concentrated in 14 of the district's elementary schools, three junior high schools, and one senior high school. In these 18 schools the percentage of Mexican-American students ranges from 44% to 92% of the student body.

[7]In suggesting that by some sleight of hand we transform a violation of state law to a *per se* violation of federal law, the dissent misperceives the significance we attach to the Board's failure to conform to state requirements. The entire focus of our opinion is to determine whether the district court was correct in finding that the Board lacked segregative intent. The inquiry is a factual one. We find the Board's actions (and inactions) leading to known segregative consequences in the face of its affirmative state duty to desegregate probative evidence of intent.

Despite the protestations of the dissent to the contrary, it concedes the probative value of such evidence when it acknowledges that "[i]naction in the face of an affirmative duty to desegregate may support a higher probability of discriminatory intent than does

Since 1965, the district has constructed nine new schools on newly-selected sites.[8] The Board was aware that state law required it to consider state guidelines on the formation of attendance areas in making siting decisions. Nonetheless, the Board failed to consider the state guidelines[9] and selected sites with the knowledge that each of the newly constructed schools would be imbalanced from inception, although alternatives existed. Throughout the relevant time period, the Board received a number of communications from state agencies, advising it that district schools were impermissibly segregated and insisting that it follow state guidelines. The Board chose to disregard state law totally.

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inaction when no such duty exists." Dissent at 676. The record is replete with evidence of the Board's knowing failure to act in accordance with state law. Such circumstantial evidence is considered along with the other evidence in the case in determining whether the Board acted with segregative intent. We do *not* suggest that the Board's violation of its duties under state law is in and of itself a violation of federal law, nor do we suggest that violation of state law may be redressed in federal court. *See Pennhurst State School & Hospital v. Halderman*, —— U.S. ——, 104 S.Ct. 900, 919, 79 L.Ed.2d 67 (1984).

[8]The district court provided the following table:

School	Year Opened	Percentage Spanish-surnamed When Opened	Percentage Spanish-surnamed in 1973
Williams (elementary)	1968	2.2	1.4
Henderson (elementary)	1966	5.4	1.5
Simonds (elementary)	1966	1.7	2.7
Bret Harte (Jr. high)	1966	7.0	3.4
Leland (high)	1967	5.1	3.4
Allen (elementary)	1965	14.6	4.7
Erickson (elementary)	1968	9.4	6.4
Hammer (elementary)	1966	13.7	6.6
Terrell (elementary)	1966	20.8	7.7

Diaz I, 412 F.Supp. at 317.

[9]The district court found:

> Although the board has been aware of Title 5 requirements and has realized that adherence to a neighborhood school

The Board similarly chose to maintain ethnic imbalance when it closed several northern schools. The district court went through an extensive and careful analysis of the pattern of school closures. *See Diaz I,* 412 F.Supp. at 319-22, 331-32; *Diaz III,* 518 F.Supp. at 632-35. The conclusion from this analysis can be summarized easily—little change occurred. Plaintiffs aptly refer to these actions as the "downtown shuffle." Where northern schools were closed, the Board reassigned students to other schools in the north rather than reassigning them to schools further south as suggested by numerous proposals. The district court noted two particularly disturbing aspects of the decision to close two downtown junior high schools. First, the restructuring of junior high school attendance areas resulted in two distinct feeder systems, one for the area that was predominantly Hispanic and another for the area that was predominantly Anglo. Second, the transfer of students transformed one of the district's few ethnically balanced schools into an imbalanced school. *See Diaz III,* 518 F.Supp. at 634.

Pursuant to the Field Act,[10] the Board demolished thirteen additional schools as unsafe. The Board created a task group to establish a plan for rebuilding the schools.

> policy presents an obstacle to desegregation, *the board has never directed its staff to formulate alternative criteria for student assignment or to prepare a plan for district-wide integration.*
>
> • • • • • •
>
> Under Title 5, school districts were required to consider the impact of site selection on ethnic composition of existing schools in adjacent areas. In selecting sites for new facilities in the Anglo suburban area, the district has not applied the state's checklist for improved ethnic balance.

Diaz I, 412 F.Supp. at 328 (emphasis added).

[10]The Field Act provides minimum standards for public schools to withstand earthquakes. *See* Cal.Educ.Code §§ 39140, 81130 (West 1978). The 1967 amendments to the Education Code required inspection of all school buildings by 1970. *Diaz I,* 412 F.Supp. at 317.

The task group considered several proposals to rebuild the schools in new locations and to redraw attendance areas in order to reduce ethnic imbalance. The district court found that several of the alternatives would have reduced ethnic imbalance. *Diaz I,* 412 F.Supp. at 331. The Board chose to rebuild most of the Field Act schools on their original sites and to maintain the former attendance areas.[11] The Board rebuilt two Field Act schools on newly selected sites. However, it retained the old attendance area boundaries, and both schools remained imbalanced.

During this time the Board considered, and rejected, a proposal to transfer students from the most severely imbalanced Field Act schools to nearby schools in contiguous attendance areas. Washington School had a student population of 78.4% Spanish-surnamed. Because of over-

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[11]In November of 1971 the district court issued a temporary restraining order prohibiting the construction of eleven schools pending a hearing on the preliminary injunction. In December of that same year the district court lifted the temporary restraining order and declined to issue a preliminary injunction because it found that plaintiffs had failed to show a sufficient likelihood of success on the merits. *See Diaz, I,* 412 F.Supp. at 311-12.

The district court informed the Board in very strong terms at this time that its decision was not to be interpreted by the Board to constitute judicial approval of the Board's decision to go forward with the reconstruction of the schools. The district court (and the School Board) had before it overwhelming and clear evidence that those schools would open as racially imbalanced schools and that rebuilding the schools in another location could reduce the racial imbalance in the District. Nonetheless, the district court viewed this as part of the possible *remedy* in the event unconstitutional segregation was found and felt that it could not enjoin it absent more compelling proof of a constitutional violation. The Board made its choice to proceed with reconstruction in spite of the district court's clear and repeated admonitions that it was possible that the only remaining remedy available to the court would be busing.

crowding, Washington students attended double sessions. One mile from Washington, Riverglen School had a Spanish-surnamed population of only 19.2% and was operating under capacity. The Board refused to redraw attendance areas or to transfer any students from the overcrowded Washington to Riverglen. Students from the Little Orchard neighborhood, which is almost 100% Spanish-surnamed, were assigned for years to Washington even though they actually lived closer to Riverglen.

Gardner School had a Spanish-surnamed population of 87.8%. Lincoln Glen, located two miles from Gardner, had a Spanish-surnamed population of 15% and was operating under capacity. Canoas School, located three or four miles from Gardner, had a Spanish-surnamed population of 9.7% and was operating under capacity. The Board never considered transferring students from Gardner to Canoas or to Lincoln Glen.

Despite strong opposition to the rebuilding of Washington and Gardner in their original locations and the presentation of feasible options to decrease segregation, the Board rebuilt them in their original locations and retained the same attendance areas. These actions were taken by the Board in the face of assurances to the State that the Board would use the opportunity presented by the rebuilding of the schools to reduce ethnic imbalance.

School District Superintendent Knight justified the rebuilding of the Field Act schools on the same sites on the ground that it "would not get in the way of a two-way exchange of students." This justification must be viewed with suspicion in light of the Board's repeated and vocal opposition to busing to achieve integration. The district court found that "[a]s early as 1963, the board, through resolution, assured the community of its opposition to busing for integration; the board has not deviated from

this position." *Id.* at 324. The Board proclaimed that it would rebuild on the same sites in order to bus more effectively, while at the same time pronouncing it would never bus because it was seeking other solutions to the segregation problem.

The Board's wide use of busing for everything except integration is itself suspect. In 1973-74, 10,431 of 36,000 students were bused daily. All but 14 of the district's 50 schools used buses to transport students within designated attendance areas. Studies commissioned by the district showed that the total busing required to integrate the district would involve only 6,000 students—3,000 Hispanic students and 3,000 Anglo students. The Board was clearly not opposed to busing *per se,* yet it repeatedly voiced its opposition to busing for the purposes of integration. The Board's use of buses for every purpose but integration, coupled with its intransigent resistance to the use of buses for integration, supports an inference of segregative intent. *Cf. Washington v. Seattle School District No. 1,* 458 U.S. 457, 102 S.Ct. 3187, 73 L.Ed.2d 896 (1982) (initiative that treated busing for integration differently from busing for other purposes invalid).

In summary, the Board responded to a series of opportunities to select school locations and designate the boundaries of attendance areas by selecting sites and designating boundaries in a manner that ensured continued segregation. "In ascertaining the existence of legally imposed school segregation, the existence of a pattern of school construction and abandonment is . . . a factor of great weight." *Swann,* 402 U.S. at 21, 91 S.Ct. at 1278-79. *See also Dayton,* 443 U.S. at 540, 99 S.Ct. at 2980. The Board responded to suggestions for less segregative alternatives by rejecting them. It responded to the guidelines imposed by the State of California by ignoring them.

F. Overcrowding, Faculty Assignment and Educational Priorities

The Board response to overcrowding was two-fold—the use of portables and double sessions. At one point, the Board instituted double sessions in overcrowded southern schools even though some northern schools were operating under capacity.[12] The district court found this disturbing because of the known "educationally disadvantageous" effects of double sessions. *Diaz III*, 518 F.Supp. at 635.

Defendants admit that faculty and staff were intentionally assigned to schools on the basis of race. The Hispanic teachers were concentrated in the downtown schools. The district court found that assignments were not made in order to assign Spanish-speaking teachers to predominantly Mexican-American schools where their language skills might be needed. *Diaz III*, 518 F.Supp. at 640-41. The district court concluded that the assignment of teachers or staff was not the result of a racially-neutral policy. *Id.* at 641.

A discriminative pattern of assignment of faculty and staff is among the most important indicia of a segregated school system. *Swan*, 402 U.S. at 18, 91 S.Ct. at 1277. The district court correctly observed that the law does not

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[12]One opportunity to reduce segregation is particularly noteworthy:

> Faced with overcrowding at Pioneer High School, a southern suburban facility with a 5.7% Spanish-surnamed population, the board transferred students to Leland High School, an adjacent southern facility with a 4.1% Spanish-surnamed population. Increased ethnic balance would have resulted from board action transferring the Pioneer students to San Jose High School, a northeastern facility separated from Pioneer by the bordering Willow Glen attendance area. Although San Jose High School, with a 59.6% Spanish-surnamed student enrollment, was operating undercapacity, the district failed to transport any Pioneer students to San Jose High School.

Diaz I, 412 F.Supp. at 323.

permit assignment of faculty on the basis of race *even if* motivated by a neutral policy, *Diaz III*, 518 F.Supp. at 640. The district court found the staff and teacher assignments had no effect on student segregation because of the small number of Spanish-surnamed faculty. Its observations may be accurate, but it neither negates the illegality of the assignment policy nor diminishes the inference of racial bias.

The Board rejected an opportunity to reduce segregation through use of portable classrooms. The district owns over 400 portable classrooms and leases others. Portable classrooms, because they are not fixed in one place, provide an inexpensive and flexible way to alter attendance boundaries to reduce overcrowding and ethnic imbalance in particular schools. The district court found that the use of portables to increase integration "was always an alternative available when a need for portables arose; the school district could always have opted to place new portables at the other end of the district from the area of overcrowding. . . ." *Diaz III*, 518 F.Supp. at 635. Nevertheless, the Board rejected numerous suggestions for portable siting to alter attendance patterns involving transferring Hispanic students from northern schools to schools farther south. The district has never used portables to improve ethnic imbalance.

In one instance in 1974 the Board did depart from its neighborhood school policy when Anglo parents in the southern schools complained about the double sessions. The Board allowed them to go out of the district rather than transfer to the northern schools in which Hispanic students predominated.

> At a school board meeting on May 2, 1974, a group of Anglo parents demanded that their children be relieved of double sessions at Muir and Bret Harte junior high schools. On May 16, the board responded by authorizing inter-district transfers permitting An-

> glo students to attend schools outside their neighborhood attendance areas for the 1974-1975 and 1975-1976 school years. Executive sessions of the board met with the district superintendent and the board attorney to reevaluate the newly-enacted authorization of interdistrict transfers. Counsel for the board advised the district that the court in this litigation might adversely interpret deviation from the board's stated adherence to a neighborhood school policy, in circumstances which relieved crowding while perpetuating ethnic imbalance. On June 20, 1974, after receiving this advice, the board rescinded its transfer resolution.

Diaz I, 412 F.Supp. at 323.

We agree with the advice the Board received from its counsel that the resolution could be interpreted as evidence of segregative intent. The later recission of the resolution because of counsel's advice does not lessen the implication.

The Board argues that the segregation in district schools results solely from its neighborhood school policy. The evidence in the record, however, demonstrates that the pattern of decisions relating to school siting, school closings, designation of attendance areas, busing, use of portable classrooms, double sessions and transfers maintained or exacerbated ethnic imbalance. None of these decisions was required by the neighborhood school policy; indeed, the Board rejected numerous alternative proposals that were consistent with the neighborhood school policy. The Board's willingness to depart from its neighborhood school policy in assigning students from the Little Orchard neighborhood to Washington rather than Riverglen and permitting students from the Anglo-dominated Muir and Bret Harte Schools to transfer to other Anglo-dominated schools indicates that the Board was willing to forego its neighborhood school policy in order to maintain segregation. Plaintiffs have presented additional evidence that suggests that the neighborhood school policy itself was a pretext for the Board's hostility to integration.

G. *The Board's Public Responses to Acknowledged Segregation*

The Board's ostensible attempts to alleviate the problem of school segregation support the conclusion that its adherence to a neighborhood school policy was motivated, at least in part, by segregative intent. The Board's actions reveal a pattern of resisting suggestions that would have decreased segregation and submitting to political pressure from members of the community opposed to integration. One example is the Board's response to efforts by the State of California to secure compliance with its integration policy.[13] The Board acted in several instances to maintain a posture of commitment to its obligations under state law, although it actually did nothing. In conjunction with the rebuilding of the Field Act schools, the Board assured the State that it would rebuild the schools on different sites to achieve greater ethnic balance. It did not. And, the Board formally adopted the state guidelines on formulation of attendance areas but did not implement them when faced with an opportunity.[14] In its 1966 report to the State in conjunction with its ethnic survey, the Board cited its 1963

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[13]On August 31, 1966, the Office of Compensatory Education informed the district that their integration statement "did not meet the intent of the requirement in the [Federal/State Guidelines] nor was it an 'appropriate approach' insofar as the utilization of Federal funds was concerned." The Board's report to the State recognized that, as of August 31, 1966, "the district's orientation and that of the . . . Office of Compensatory Education were again, divergent." The Board recognized that it had been subject to "considerable pressure" to alter its neighborhood school concept. Two repeated suggestions for change had been alteration of attendance boundaries and a one or two-way busing program. The report analyzed the costs of such an "exchange busing" at from $233,100 to $359,100 depending on the level of balance sought. *See also supra* notes 3-6.

[14]On August 5, 1965, the Board adopted policy #5007.1 in which the Board promised to establish attendance areas to eliminate

resolution on desegregation and the intent to form a citizen's committee to study the problem of segregation and recommended solutions. That committee, the Quality Urban Education Action Team (QUEST), was not formed until 1969. QUEST's history is revealing. The Board repeatedly referred to QUEST in its reports to the state as an indication of progress toward integration, while responding to QUEST in a manner that rendered the committee totally ineffective.

The record shows that at a highly emotional meeting of 1500 persons where "fear and racism" were prevalent, the Board submitted to public pressure and opened QUEST membership to all present—most of whom were opposed to desegregation. *See infra* note 16. These new members were given their choice of subcommittees on which to serve, and most joined the site location, demographics and magnet school committees. At the same time, the Board modified QUEST's mandate, instructing it to pay more attention

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segregation in its schools in accordance with Title 5 of the California Administrative Code. The statement provided:

> Establishment of Attendance Areas
> In establishing attendance areas for each regular day school maintained, it is the intent of the Board of Education to comply with Article 3, Section 14020, California Administrative Code, Title 5, Education, to the fullest extent to avoid the ultimate result of segregation of pupils by ethnic or racial composition.
>
> Article 3, Section 14020. State Board Policy. Attendance Areas and Practices. "It is the declared policy of the State Board of Education that persons or agencies responsible for the establishment of school attendance centers or the assignment of pupils thereto shall exert all effort to prevent and eliminate racial and ethnic imbalance in pupil enrollment. The prevention and elimination of such imbalance shall be given high priority in all decisions relating to school sites, school attendance areas and school attendance practices."

to revision of instructional programs and less attention to attempting to reduce ethnic imbalance without delay.[15]

Board members told Aaron Harris, Chairperson of QUEST, that the Board would like to dissolve or suspend QUEST because the public perceived that integration would result and that such a perception might have adverse impact upon the upcoming bond election. Over Mr. Harris's opposition, the executive committee of the reconstituted QUEST voted to suspend activities, a decision in which Harris stated, "the Board happily acquiesced." Despite these difficulties, QUEST put together a final report making recommendations for solutions to the segregation problem, including magnet schools, education parks, open enrollment,

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[15]The modified mandate stated:

> On the problem as a whole, however, it is our preliminary judgment that as between the broad areas of instructional program on the one hand and achieving racial and ethnic balance on the other for the near term priority should be given to the instructional program. We are motivated in this by the belief that the hoped-for benefits of racial and ethnic balance in the schools will not be achieved unless revisions have been made in the instructional program, the grouping of students and the training of teachers to make the entire school experience more responsive to the needs of all elements of our community. Simply stated, a racially balanced school is not necessarily an integrated one and does not necessarily provide a quality education. For the long term, we feel that priority should be placed on achieving racial and ethnic balance in our schools to the fullest extent possible within our means as it is to us an essential component of quality integrated education. Finally, we wish to restate our overall philosophy that we are committed to serving the needs of this community. And as in the past, this Board would not voluntarily adopt a program which it had reason to believe the community had not participated in or would not support.

Id.

and voluntary busing.[16] The Board implemented none of QUEST's suggestions.

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[16]The final QUEST report supplies a useful and informative summary of the sequence of events outlined by the evidence. This report is supported by testimony at trial.

> The first progress report was presented to the Board of Education at its meeting of October 16, 1969. . . .
>
> The chairman prepared an "Introduction to QUEST" for distribution to the schools on November 25, 1969. The emotional aspect of the problem was thrust forward, not by what the Introduction said, but rather by what it did not say. Phones rang incessantly. Rumors ran rampart [sic]. "You're not going to bus my child anywhere!" "Who are you people on the committee?" "Are you from Berkeley?" "What is the problem?" "Why haven't we heard about QUEST before now?" For two months, fear and apprehension overruled reason, although several public appearances were made by QUEST members to explain. This set the stage for the Board's meeting of February 5, 1970, at which time a progress report of QUEST was scheduled. More than 1,500 people attended. The main points of that progress report were that a Student Advisory Committee had been established under the guidance and direction of Mr. David Curry, General Vice-chairman, consisting of students from the junior and senior high schools; that no recommendation for busing any students to correct imbalance had been made by the Demographic Task Force; that the task force had been primarily involved in orientation and education; and that QUEST proposed hiring an Intergroup Relations Specialist. (See copy of recommendation at the end of this section.) Almost a year later, February 1970—December 1970, no action has been taken on the latter recommendation.
>
> The meeting was a disaster in terms of the unusual display of emotionalism. It was unfortunate because of the lack of understanding and appreciation of the nature of QUEST's task. Finally, the meeting was tragic and predictable because of the fear and racism expressed. This culminated in an open invitation [by the Board] to those present to become members of QUEST. Thus, an opportunity for greater community participation was granted at the expense of alienating an already dedicated group of citizens. QUEST was consequently reconstituted, and many of the alienated members resigned. Others

Any doubts about whether the Board acted with segregative intent are dispelled by its public statements regarding the bond issue elections. The district court found that these statements

> offered 1) the carrot that the bond money would not be used to subsidize busing (and reiterated the Board's

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later resigned for different reasons, principally over disagreement with the proposed structure.

The newly constituted QUEST, as organized and approved by the Board of Education, received its new charge [from the Board] in March, 1970. The study was to encompass a long range goal to a quality integrated education, and a short range goal to qualify educational components. . . .

• • •

As the work of the task forces progressed, it was apparent that another period of orientation and education was a necessary preliminary to any effective work. The level of political machinations that followed were alien to our orientation as one task force in particular, Site Location and Usage, pursued a course of "benign racism". Many members of that committee consciously and subconsciously either denied the existence of a problem or explained it away with an almost fanatical adherence to the so-called "neighborhood school concept". This approach persisted even though the task force chairman, Art Ryder, prepared an excellent outline of study more appropriate to that task force's specified charge. At least one member attached [sic] QUEST's leadership as having a "dominant theme of sudden change or experimentation . . . which . . . must be challenged when it places the membership in a position of disrepute in the community." The fact of the matter was that this QUEST member was an integral part of QUEST's leadership. This was one of many examples of the kind of paranoia that raised its ugly head much too often. The contrast between the divisive and unifying forces is clearly demonstrated in the number and quality of the final recommendations. While some worked in earnest, others connived, schemed and attacked.

• • •

The Executive Committee of QUEST voted to suspend activities to coincide with the November 19, 1970 Board

> own continued disinclination to use busing for integration purposes) and 2) the stick that failure to pass the bond issue would result in (a) alterations in the neighborhood school policy to spread double sessions throughout the district and (b) the need to send students from the northern end of the district to the south, and/or vice versa.

Diaz III, 518 F.Supp. at 638. The Board catered to a pro-segregation public by making assurances that it could not use bond money to finance busing for integration. The message these statements conveyed, and were intended to convey, was unmistakable: if the public did not vote for the bond issue, busing would result. If it did vote for the issue, no busing would result. These statements, considered in the

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announcement of a tax and bond election. Many members were happy about this decision because it meant an end to meetings and a greater assurance of a successful tax and bond election. Others were disappointed because much unfinished work had to be done and the decision was being based on reaction to an undetermined size of dissidents in the community.

The Board happily acquiesced in this decision and promised to review the final recommendations of QUEST in time to be included in the tax and bond announcement by November 19, 1970. The trust and faith in the honorable intentions of the Board were once again questioned as the Board allotted no time during its work sessions to consider QUEST's recommendations. January, 1971, was set as the new date for QUEST work sessions to begin.

A grave redundancy deserves mentioning at this point. The Board plans to submit QUEST's final report to interested persons and organizations in the community for study and comments before taking any action. A citizens' report submitted to other citizens who will perhaps re-study and submit a report is a kind of buck-passing, repetitive cop-out that only a Board committed to maintaining the status quo can, in good conscience, do. The original structure of QUEST made provision for additional community involvement, but the abrupt ending prevented this from being accomplished.

Redundancy, mistrust, delaying tactics, etc. were part and parcel of the inability of QUEST to attract and hold Mexican-

context of the other evidence presented in this case compel an inference of segregative intent.[17]

III. THE CUMULATIVE WEIGHT OF THE EVIDENCE COMPELS A FINDING OF SEGREGATIVE INTENT

In making its determination in respect to the Board's intent, the district court erred in failing to give weight to the cumulative impact of the evidence. *See Washington v. Davis,* 426 U.S. 229, 242, 96 S.Ct. 2040, 2048, 48 L.Ed.2d 597 (1976); *Arlington Heights,* 429 U.S. at 266-68, 97 S.Ct. at 563-65; *Flores v. Pierce,* 617 F.2d 1386, 1389 (9th Cir.), *cert. denied,* 449 U.S. 875, 101 S.Ct. 218, 66 L.Ed.2d 96 (1980).

The District repeatedly promised the public and state officials that it would desegregate its schools in compliance with state law. Yet, it deliberately ignored state guidelines in making decisions and consistently refused to implement suggestions for desegregation. Similarly, in *Columbus,* an element of the district court's finding of segregative intent was the Board's failure to employ workable suggestions for improving racial balance despite promises otherwise. *See Columbus,* 443 U.S. at 453, 99 S.Ct. at 2944.[18]

American citizens as active participants. The schools of this district must share, on part, the blame for the scarcity in leadership among Mexican-Americans.

[17]We do not find the fact that the bond issues failed as any mitigation of the effect of this evidence, for we are looking for evidence of the Board's state of mind. Whether the voters were wiser or the Board was insufficiently persuasive, our conclusion remains the same.

[18]In *Columbus,* the Supreme Court emphasized that the Board of Education had received many recommendations over the years that would have alleviated some of the segregation in the Columbus system; the school board consistently refused to follow up on any of those recommendations. These failures to act were particularly important because "the Columbus system grew rapidly in terms of

The Board sited new schools, rebuilt Field Act schools, used portables and closed schools in a manner that maintained and, in some instances, intensified ethnic imbalance. The Supreme Court found such actions to evince segregative intent in *Columbus,* 443 U.S. at 462 & n. 11, 467, 99 S.Ct. at 2949 & n. 11, 2951 (site selection and construction),[19] in *Dayton,* 443 U.S. at 532, 533 n. 7, 540, 99 S.Ct. at 2976, 2976 n. 7, 2980 (siting, construction, and addition of classroom space at existing schools), in *Swann,* 402 U.S. at 20-21, 91 S.Ct. at 1278-1279 (construction and closures); and in *Keyes,* 413 U.S. at 192, 93 S.Ct. at 2689 (construction, mobile classrooms).

The Board used buses for one-third of its students, but refused to use those buses to achieve integration. *See Washington v. Seattle School Dist. No. 1,* 458 U.S. 457, 486-87,

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geography and number of students, creating many crossroads where the Board could either turn toward segregation or away from it." 443 U.S. at 463 n. 12, 99 S.Ct. at 2949 n. 12. The Supreme Court upheld the district court's inference of segregative intent "'from the Columbus defendants' failure after notice, to consider predictable racial consequences of their acts and omissions when alternatives were available which would have eliminated or lessened racial imbalance.'" *Id.* (quoting 429 F.Supp. 229, 240 (S.D.Ohio 1977)).

[19]103 new schools had been built in Columbus; 87 opened with student bodies that were predominantly of one race. The Court noted that this segregative result was "reasonably foreseeable under the circumstance in light of the sites selected." *Columbus,* 443 U.S. at 462 n. 11, 99 S.Ct. at 2949 n. 11. It went on to note, however, that it did not rely on an inference of discriminatory purpose based on the reasonably foreseeable consequences of the district's actions because the record reflected that the school board had been warned about the segregative consequences of its actions, and that alternatives had been proposed that would have increased integration. *Id.* Similarly, in *Dayton Board of Education v. Brinkman,* 443 U.S. 526, 99 S.Ct. 2971, 61 L.Ed.2d 720 (1979), "22 of 24 new schools, 78 of 95 additions, and all 26 portable schools built . . . opened virtually all black or all white." 443 U.S. at 533 n. 7, 99 S.Ct. at 2977 n.7.

102 S.Ct. 3187, 3203-04, 73 L.Ed.2d 896 (1982) (invalidating a Washington initiative that treated busing for integration differently from busing for other purposes). *Cf. Swann,* 402 U.S. at 18, 91 S.Ct. at 1277 (existing policy of transportation an important consideration in identifying a segregated system).

The Board assigned faculty and staff on the basis of ethnic origin without any plausible neutral justification. See Columbus, 443 U.S. at 460, 461, 467, 99 S.Ct. at 2948, 2948, 2951; *Dayton,* 443 U.S. at 532, 536 n. 9, 99 S.Ct. at 2976, 2978 n. 9; *Swann,* 402 U.S. at 18-19, 91 S.Ct. at 1277-1278; *Green v. County School Board,* 391 U.S. 430, 435, 88 S.Ct. 1689, 1692, 20 L.Ed.2d 716 (1968).

The Board responded to overcrowding in the schools by instituting educationally disadvantageous double sessions and departed from its neighborhood school policy to avoid transferring Anglo students to predominantly Hispanic schools. *See Columbus,* 443 U.S. at 461-62 n. 8, n. 9, 99 S.Ct. at 2948-49 n. 8, n. 9 (departure from neighborhood school policy); *Dayton,* 443 U.S. at 539-40, 99 S.Ct. at 2980-81 (use of optional attendance zones); *Keyes,* 413 U.S. at 191, 93 S.Ct. at 2688 (manipulation of attendance zones).

The Board catered to a public that opposed segregation. This is evidenced by the Board's statements supporting the bond issues, in which it raised the spectre of busing for integration if the levy was not passed. The Board was instrumental in transforming the QUEST committee from a group of concerned citizens to one dominated by those opposed to desegregation. The Board ignored the recommendations the committee made and consistently rejected other suggestions for desegregating its schools.

An inescapable conclusion that the Board intended segregation emerges from a view of the evidence as a whole. The pattern of Board choices that consistently maintained or intensified segregation is apparent. Although many of the

available alternatives would have presented an incomplete solution, each could have contributed incrementally toward reducing ethnic imbalance. In almost every instance, the Board chose to "turn toward segregation" rather than away from it. *Columbus,* 443 U.S. at 463 n. 12, 99 S.Ct. at 2949 n. 12. We are left with the firm conviction that the district court was clearly erroneous in its ultimate conclusion that the Board did not act with segregative intent.

IV. CONCLUSION

We hold that the San Jose School Board intentionally maintained segregated schools throughout the District. We remand to the district court for the formation of an appropriate remedy and an award of attorneys' fees to plaintiffs.

REVERSED and REMANDED.

CHOY, Circuit Judge, with whom WALLACE and SNEED, Circuit Judges, join, dissenting:

The majority depicts the Board of Trustees of the San Jose Unified School District (the "Board") as an insensitive body eager to seize upon opportunities to maintain or exacerbate racial segregation in the school district for the past twenty years. One reading the majority opinion gets the impression that the Board's conduct was unexplainable and inexcusable, and that the district judge's ruling in the Board's favor has no redeeming feature whatever. The majority, however, ignores many facts critical to the district court's ruling; then the majority makes its own findings of fact to support its result.

Even with the facts that have been ignored by the majority, I may not have come to the same conclusions as did Judge Peckham if I had been the trial judge. But Judge Peckham has been with this complex case since November of 1971. He has personally observed the witnesses and has had the opportunity to test their believability. He thus was in a far better position than are we to determine where the

truth lies. *See Columbus Board of Education v. Penick*, 443 U.S. 449, 470-71, 99 S.Ct. 2941, 2983-84, 61 L.Ed.2d 666 (1979) (Stewart, J., concurring). I simply cannot say that he was so wrong as to justify this court's finding the facts anew. Accordingly, I dissent.

I. *The Legal Standard Applied by the District Court*

For the most part, the majority does not take issue with the legal standard applied by the district court. In Part III of the opinion, however, the majority states that "the district court erred in failing to give weight to the cumulative impact of the evidence." Maj. op. at 674. To the extent that the majority suggests that the district court applied an improper legal standard, the majority is clearly wrong. Although the district court reached a different conclusion from the majority, it certainly reached its result considering the evidence as a whole. *See, e.g.*, 518 F.Supp. at 629 ("the court will . . . attempt to explain . . . why the court does not feel that the evidence, on balance, supports a finding of segregative intent. . . ."); *id.* at 638 ("The refusal to date to consider bussing . . . is not sufficient, in the context of the rest of the evidence in this case, to support a finding of liability."). The majority is only taking issue with the district court's factual findings. To these I now turn.

II. *The District's Duty Under State Law*

A theme recurring throughout the majority opinion is that failure of the Board to take steps allegedly required by state laws and state Board of Education guidelines convincingly proves that the Board segregated intentionally. To show a violation of the Fourteenth Amendment a plaintiff must prove more than that a school district took actions that created or maintained ethnic imbalance. Doing so with intent to discriminate must be proved. *See Columbus Board of Education v. Penick*, 443 U.S. 449, 464, 99 S.Ct. 2941, 2949, 61 L.Ed.2d 666 (1979); *Keyes v. School District No. 1*, 413 U.S. 189, 208, 93 S.Ct. 2686, 2697, 37 L.Ed.2d 548 (1973).

Under the California Constitution, the school districts do have an affirmative obligation "to take reasonably feasible steps" to alleviate school segregation. *Crawford v. Board of Education,* 458 U.S. 527, 535-36, 102 S.Ct. 3211, 3216-17, 73 L.Ed.2d 948 (1982); *McKinny v. Oxnard Union High School District Board of Trustees,* 31 Cal.3d 79, 92, 642 P.2d 460, 467, 181 Cal.Rptr. 549, 556 (1982). Assuming *arguendo* that plaintiffs have shown facts constituting a violation of state law, the majority's attempt to transform a breach of a state-imposed duty into a Fourteenth Amendment violation cannot stand. Discriminatory intent means that the actor selected his course of conduct "because of" rather than "in spite of" its adverse effects upon an identifiable group. *Personnel Administrator v. Feeney,* 442 U.S. 256, 279, 99 S.Ct. 2282, 2296, 60 L.Ed.2d 870 (1979). The addition of an affirmative duty under state law to alleviate racial imbalance does not transform inaction into intentional discrimination. Inaction in the fact of an affirmative duty to desegregate may suggest a higher probability of discriminatory intent than does inaction when no such duty exists. But the emphasis the majority places upon what it believes are state law violations leads me to fear that it wishes to bludgeon the San Jose Unified School District in federal court for a violation of state law. *See Sullivan v. Murphy,* 478 F.2d 938, 972 (D.C.Cir.), *cert. denied,* 414 U.S. 880, 94 S.Ct. 162, 38 L.Ed.2d 125 (1973) (when constitutional rights are infringed, federal rather than state law defines those rights); *see also Pennhurst State School & Hospital v. Halderman,* ——— U.S. ———, 104 S.Ct. 900, 911, 79 L.Ed.2d 67 (1984); *Watson v. Tarpley,* 59 U.S. (18 How.) 517, 520, 15 L.Ed. 509 (1855) ("Whilst it will not be denied, that the laws of the several States are of binding authority upon . . . persons and property within their appropriate jurisdiction, it is perfectly clear that those laws cannot . . . destroy or control the rights of parties litigant to whom the right of resort to [federal] courts has been secured by the laws and constitution [of the United States].").

III. *The Proposals to Ameliorate Segregation*

The majority observes that various organizations presented proposals to the Board that "could have ameliorated" the segregation, some of which allegedly presented no threat to the neighborhood school policy. *See* maj. op. at 665. The majority concludes that the Board's failure to adopt one or more of these proposals conclusively demonstrates segregative intent. I disagree.

Although adherence to a neighborhood school policy in an area of de facto segregation probably will perpetuate the segregation in the schools, most federal courts view the neighborhood school system as deeply rooted in American culture and soundly backed by nondiscriminatory reasons, *see Keyes v. School District No. 1*, 413 U.S. 189, 245-48, 93 S.Ct. 2686, 2715-17, 37 L.Ed.2d 548 (Powell, J., concurring in part and dissenting in part); *United States v. Jefferson County Board of Education*, 372 F.2d 836, 879 (5th Cir.1966), *aff'd en banc*, 380 F.2d 385, *cert. denied*, 389 U.S. 840, 88 S.Ct. 67, 19 L.Ed.2d 103 (1967); *Deal v. Cincinnati Board of Education*, 369 F.2d 55, 60 (6th Cir.1966); *see also Crawford v. Board of Education*, 458 U.S. 527, 537 n. 15, 102 S.Ct. 3211, 3218 n. 15, 73 L.Ed.2d 948 (1982); *United States v. Texas Education Agency (Austin Independent School District)*, 564 F.2d 162, 168 (5th Cir.1977), *cert. denied*, 443 U.S. 915, 99 S.Ct. 3106, 61 L.Ed.2d 879 (1979). Adherence to a neighborhood school system could easily be explained on nondiscriminatory grounds, and such adherence, without more, is thus no indication of discriminatory intent.

The majority finds discriminatory intent partly because the Board allegedly "deliberately ignored state guidelines in making decisions and consistently refused to implement suggestions for desegregation. . . . The Board sited new schools, rebuilt the Field Act schools, used portables and closed schools in a manner that maintained and, in some instances, intensified ethnic imbalance." Maj. op. at 674.

The majority, however, chooses to ignore the district court's finding that

> [w]hile the district failed to consider the state guidelines on evaluating attendance areas, the fact is that, *absent a major reformation of the attendance patterns in the entire district and a complete abandonment of the concept of neighborhood schools, the formal consideration of the state guidelines would have had no effect on the selection of sites and the construction of these schools.*

518 F. Supp. at 630 (emphasis added). The majority also fails to consider this part of the Westinghouse Learning Corporation's report:

> The consultants considered a number of possibilities wherein buildings might be located so as to enhance integration without bussing. *There is no such possibility.* In fact, the current community or neighborhood school pattern provides the least amount of bussing for all students when compared to the educational park proposals.

(Emphasis added.) As the district court pointed out, the Westinghouse Learning Corporation, the Building Master Plan Task Group, and Dr. Knight, the school district superintendent, all concluded that the only realistic solution to segregation in the school district was some form of two-way bussing. 518 F.Supp. at 631, 637; 412 F.Supp. at 324.

In view of these authoritative conclusions, the Board could have concluded that any real progress toward desegregation could be achieved only by abandoning the neighborhood school concept. Certainly, several proposals presented to the Board assertedly would work within the neighborhood school concept. Considering the shape of the school district and the extent of de facto segregation within it, however, the Board may very well have decided, and decided reasonably, that implementation of any, or even

of all, of the proposals to enhance integration without bussing would have produced at most token progress toward desegregation. The district court could not fault the Board for rejecting these proposals, and I cannot say that the court was clearly wrong in its finding.

The majority also argues that the school district's rejection of bussing as a means to desegregate is unreasonable because it already busses one-third of its students on a daily basis. Maj. op. at 669.

Except for students with special needs such as the physically handicapped, all students who are bussed are transported only within their attendance areas. *See* 412 F.Supp. at 314-15. Equating that type of bussing with cross-town bussing for integration is somewhat simplistic. In November of 1979 the voters of the State of California amended the state constitution to curtail the power of state courts to remedy de facto segregation by ordering bussing or school reassignment. Their purposes, as stated in the measure itself, were:

> making the most effective use of the limited financial resources now and prospectively available to support public education, maximizing the educational opportunities and protecting the health and safety of all public school pupils, enhancing the ability of parents to participate in the educational process, preserving harmony and tranquility in this state and its public schools, preventing the waste of scarce fuel, resources, and protecting the environment.

Crawford v. Board of Education, 458 U.S. 527, 543 n. 29, 102 S.Ct. 3211, 3221 n. 29, 73 L.Ed.2d 948 (1982). The Supreme Court stated that these purposes "are legitimate, nondiscriminatory objectives." *Id.* at 545, 102 S.Ct. at 3222. The school district, therefore, had legitimate reasons for rejecting the bussing proposals. The district court so found. As we are reviewing the district court's findings for clear

error, I find no basis on which to disagree with the district court.

IV. *Catering to a Pro-Segregation Public*

The majority also castigates the Board for "cater[ing] to a pro-segregation public," maj. op. at 673, and "transforming the QUEST committee from a group of concerned citizens to one dominated by those opposed to desegregation." *Id.* at 675.

It is difficult to ignore the public's powerful and strident general opposition to bussing. A typical community reaction is shown in the story of Wilson Junior High School:

> [T]he district considered transferring all Wilson Junior High School students to adjacent Markham Junior High School, with only 7.2% Spanish-surnamed students. Because Markham was conducting double sessions, the proposed transfer was contemplated as a temporary measure pending location of a site in the southernmost portion of the northern downtown core for a magnet school with a large "integrated student body." However, community opposition developed, and a parents' meeting held at Markham Junior High School indicated mass hostility to bussing students from Wilson to Markham.

412 F.Supp. at 322.

Community opposition also abounded when the Board formed QUEST. The district court found that the Board agreed to open the membership of QUEST to more people under pressure from members of the community who feared the outcome of QUEST's work. Furthermore, 1,500 people, mostly opposed to the work of QUEST, attended the meeting at which QUEST's membership was opened. Maj. op. at 672 n. 16; 518 F.Supp. at 639; *see also* 412 F.Supp. at 325.

Certainly, strong community opposition was not a force to be taken lightly by the Board. As the QUEST report stated:

> Even if the present school board were to adopt a plan of forced integration, it could not be carried out in the face of an opposition constituting 55% of the community—let alone 82%. Plans adopted and laws passed can soon be repealed, and subsequent elections would install men in office intending just that. In addition, any plan would require bond issues to be passed by voters who oppose the plan.

QUEST, *Report to the Board of Education* 93 (1970).

Subsequent events demonstrated the correctness of the writer's observation. During the time of this litigation, the Board needed voter authorization for bond issues to finance the construction of new schools. Voters rejected bond issues for this purpose in 1969, 1971, 1972, and 1973. 412 F.Supp. at 324-25. Moreover, in a 1972 initiative measure, known as Proposition 21, voters of California repealed the state guidelines defining racial imbalance that were heavily relied on by the majority. *See* 412 F.Supp. at 327-28; *Santa Barbara School District v. Superior Court,* 13 Cal.3d 315, 530 P.2d 605, 118 Cal.Rptr. 637 (1975) (upholding the validity of the repealer). Finally, in 1979 the California voters amended the Equal Protection Clause of the California Constitution to curtail court-ordered bussing and pupil reassignment. *See Crawford v. Board of Education,* 458 U.S. 527, 531-32, 102 S.Ct. 3211, 3214-15, 73 L.Ed. 2d 948 (1982).

In the face of this powerful opposition to forced bussing, the district court found that the Board was doing the best it could in its dealings with QUEST:

> [P]rior to the "opening up" of the QUEST membership, there is no evidence that the Board attempted to direct the findings of QUEST or to otherwise inter-

fere with its operations. To the contrary, the evidence indicates that school officials did their utmost to ensure, when QUEST was organized and began its work, that articulate, concerned representatives of all segments of the community were involved, and to ensure that those involved in QUEST desired to develop proposals to integrate the school system, not to sabotage the effort. . . .

[When QUEST's membership was opened up,] the Board made subsequent efforts to recruit more people from other, more supportive segments of the community to join in the effort and to presumably counterbalance the influx of people hostile to QUEST's mission. . . .

. . . [T]he Board's initial organization of QUEST, and the efforts both then and at the later point of reconstitution [were made] to ensure that the community was well represented and that persons sympathetic to the work of QUEST were in the positions of leadership in both the original and reconstituted organization. . . .

Indeed, the Board's persistence in seeing the work of QUEST go forward, in attempting to protect it from being overwhelmed by those hostile to its work, and in continuing, despite pressure, to encourage QUEST to formulate proposals for the integration of the district —even if for the long term—[supports] a finding that the Board was trying its best, in a difficult situation. . . .

518 F.Supp. at 639-40. I therefore cannot agree with the majority's assertion that the only picture of the Board emerging from the evidence shows it as only paying lip service to QUEST while it was actually and intentionally inimical to it and its work.

V. *The Bond Issue Elections*

The majority regards the Board's statements in the bond issue elections as conclusive on the issue of intent. *See* maj. op. at 672-673. As the district court pointed out, however, it is reasonable to view these statements differently:

> The statements concerning the spread of double sessions and the need to transport students to the other end of the district if the various issues did not pass seem, in context, to be simply realistic factual statements of the results which would flow from the failure of the bond issues to pass. . . . There is no particular emphasis given to them, nor, in context, is there any suggestion that the school board meant to do anything but point to the many burdens which would be placed on the students and the district in general by such a failure of the bond issue to pass.

518 F.Supp. at 638-39.

> Some pro-bond voters may have been motivated by a fear or dislike of Spanish-surnamed students in southern facilities; however, they may also have been motivated by a fear of congestion or a multitude of other considerations.

412 F.Supp. at 332.

VI. *Conclusion*

Whether actions that separate students racially amount to intentional segregation "is an issue that can present very difficult and subtle factual questions." *Columbus Board of Education v. Penick,* 443 U.S. 449, 470-71, 99 S.Ct. 2941, 2983, 61 L.Ed.2d 666 (1979) (Stewart, J., concurring); *see United States v. Yellow Cab Co.,* 338 U.S. 338, 340, 70 S.Ct. 177, 178, 94 L.Ed. 150 (1943). To us, Judge Peckham's exhaustive and thoughtful opinion "appears to represent the considered judgment of an able trial judge, after patient hearing. . . ." *Yellow Cab,* 338 U.S. at 341,

70 S.Ct. at 179. The majority's voluminous review of the evidence unfavorable to the judgment demonstrates only that the trial court would have been justified if it had reached a contrary conclusion. Under "not clearly erroneous" review, then, I would affirm.

Appendix B

United States Court of Appeals
for the Ninth Circuit

No. 81-4434
DC# CV 71-2130 RFP

ARNULFO M. DIAZ, etc., et al.,
Plaintiffs-Appellants,

vs.

SAN JOSE UNIFIED SCHOOL DISTRICT, et al.,
Defendants-Appellees.

ORDER

[Filed Nov. 7, 1984]

Before: BROWNING, Chief Judge, and CHOY, WALLACE, SNEED, TANG, SCHROEDER, FLETCHER, ALARCON, FERGUSON, NELSON and BOOCHEVER, Circuit Judges.

The members of the limited en banc panel have voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc by the full court.

The full court has been advised of the suggestion for rehearing en banc by the full court, and no judge of the court has requested a vote. Fed. R. App. P. 35(b).

The suggestion for rehearing en banc by the full court is rejected.

Appendix C

ARNULFO M. DIAZ and Socorro Diaz, as the parents and next friends of Fernando Diaz, Miguel A. Diaz and Juan F. Diaz; Jose Vasquez, as the parent and next friend of David Vasquez, individually and on behalf of all other persons similarly situated, Plaintiffs-Appellants,

v.

SAN JOSE UNIFIED SCHOOL DISTRICT, Charles Knight, individually and as District Superintendent of the San Jose Unified School District; Neil H. Geier, Jr., Elizabeth J. Allen, Edwin P. Jones, Jr., Mary K. McCreath, and Donald L. Raimondi, individually and as members of the Board of Education of the San Jose Unified School District, Defendant-Appellees.

No. 81-4434.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted August 11, 1982.
Decided May 10, 1983.

Before KASHIWA,* ANDERSON, and FARRIS, Circuit Judges.

J. BLAINE ANDERSON, Circuit Judge:

Plaintiffs, parents of Spanish-surnamed children attending public school in the San Jose Unified School District, filed this class action on behalf of themselves and all other parents of children similarly situated. The complaint charged that defendants were operating a segregated public school system in violation of the Fourteenth Amendment, and sought desegregation of the school district. The district found that the school district was racially imbal-

*The Honorable Shiro Kashiwa, Circuit Judge, United States Court of Appeals for the Federal Circuit, sitting by designation.

anced and that the imbalance had been maintained by defendants. No liability attached, however, because the court decided defendants acted without segregative intent. *Diaz v. San Jose Unified School District,* 412 F.Supp. 310 (N.D.Cal.1976).

In a previous appeal, this court reversed and remanded for further proceedings, reasoning that the district court's decision suggested the school district's racially-neutral neighborhood school policy "constituted either a complete defense to the charge of segregative intent, or, completely dispelled the inferences of segregative intent that flowed from the [plaintiffs'] proof." *Diaz v. San Jose Unified School District,* 612 F.2d 411, 415 (9th Cir. 1979). We went on to hold that, in light of *Columbus Board of Education v. Penick,* 443 U.S. 449, 99 S.Ct. 2941, 61 L.Ed.2d 666 (1979), and *Dayton Board of Education v. Brinkman,* 443 U.S. 526, 99 S.Ct. 2971, 61 L.Ed.2d 720 (1979), defendants' neighborhood school policy could not be determinative of the lack of segregative intent, but rather was "merely relevant evidence to be taken into account in deciding whether the forbidden intent did or did not exist." *Id.* With the caveat that we were expressing no opinion on the relative weight of the evidence, *id.* at 416 n. 2, this court reversed and remanded for further proceedings in light of *Columbus, Dayton,* and the principles espoused in our opinion. *Id.* at 416.

On remand, the district court analyzed *Columbus* and *Dayton,* this court's opinion, and three subsequent Supreme Court decisions, and carefully reconsidered the evidence in light thereof. *Diaz v. San Jose Unified School District,* 518 F.Supp. 622 (N.D.Cal.1981). Once again, the court found insufficient evidence to support a finding of segregative intent. Because the district court's factual findings were not clearly erroneous and because the proper legal principles were correctly applied to the facts, we affirm.

I. THE DISTRICT COURT'S FINDINGS

To avoid repeating the fact statements in the three prior reported opinions, only a very brief summary of the facts is presented here. The parties have always agreed that because no statutory dual system of schools has ever existed, plaintiffs "must prove not only that segregated schooling exists but also that it was brought about or maintained by intentional state action." *Keyes v. School District No. 1,* 413 U.S. 189, 198, 93 S.Ct. 2686, 2692, 37 L.Ed.2d 548, 557 (1973). *Accord Washington v. Davis,* 426 U.S. 229, 238-48, 96 S.Ct. 2040, 2046-52, 48 L.Ed.2d 597, 606-612 (1976). It is undisputed that since at least 1962, defendants have known the school district was racially imbalanced and since approximately 1965, defendants have implemented a series of policy decisions whose cumulative effect has been to maintain the imbalance. Those decisions involve (1) site selection and school construction; (2) adoption of a neighborhood school policy with board-designated attendance areas; (3) reconstruction of Field Act Schools; (4) school closures and student reassignments; (5) location of portable classrooms and maintenance of double sessions; (6) student transportation; (7) presentation of materials supporting bond elections; (8) response to integration proposals by citizens' committee; (9) faculty and staff assignments; and (10) failure to integrate despite a state statutory duty and a publicly-issued board policy to relieve ethnic imbalance. 412 F.Supp. at 315.

What is disputed is the existence of segregative intent, a factual matter to be reviewed for "clear error." *Pullman-Standard v. Swint,* 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982); *Dayton Board of Education v. Brinkman,* 443 U.S. 526, 534, 99 S.Ct. 2971, 2977, 61 L.Ed.2d 720, 731 (1979). In an effort to prove segregative intent, plaintiffs' approach throughout this litigation has been to focus on the foregoing policy decisions in an attempt to establish that each was supported by little or no educational justification.

Plaintiffs were unable to persuade the district court of the lack of educational justification; indeed, the district court found that in each instance, there were reasonable and rational explanations for the decisions. We do not believe it is either necessary or useful to again discuss each challenged action or failure to act. With respect to many of the policy decisions, plaintiffs' brief merely repeats and reviews the evidence presented below and argues that the district court's rationale on remand falls squarely back on the neighborhood school justification. We read the district court's opinion differently. Rather than taking the neighborhood school policy at face value, the district court sensitively and thoughtfully examined the historical and demographic underpinnings of the policy as it has been applied in the San Jose Unified School District. That analysis reveals that it was not slavish adherence to the neighborhood school policy that produced the racial imbalance, nor did adherence to the policy raise an inference of segregative intent or in all respects dispel such an inference otherwise raised. The neighborhood school policy was properly considered as one factor, among many, that dispels the inference of segregative intent. We believe the district court's opinion articulates adequate bases, apart from the neighborhood school policy, for all of its findings of fact, and plaintiffs have failed to meet their burden of demonstrating that those findings are clearly erroneous. We do, however, find it necessary to discuss three fresh arguments interposed by plaintiffs. These concern transportation, faculty-staff assignments, and the state-imposed duty to integrate.

II. TRANSPORTATION

As the district court explained, the San Jose Unified School District uses a great deal of busing, "both in terms of the number of students being transported (approximately one-third of the student population) and in terms of the money expended (over $850,000 per year)." 518 F.Supp.

at 636. The district court found that the vast majority of busing occurs within attendance areas; however, transportation outside attendance areas is quite commonly used for special schools and programs. *Id.* The district court further found that school officials were aware the school district could not be integrated without busing, yet officials remained adamantly opposed to busing for purposes of integration. *Id.* at 637.

Plaintiffs have used the foregoing findings to construct two arguments. First, plaintiffs contend that, in the face of school officials' knowledge that the district would probably remain segregated without some form of busing, the consistent refusal to consider busing is compelling evidence of segregative intent. The district court found, however, that although this evidence was "particularly disturbing," when viewed in context along with all the other evidence it would not support a finding of segregative intent. *Id.* at 637-38. This court is no less disturbed by defendants' unwillingness to consider busing as a means of alleviating the racial imbalance. The issue is close, but the district judge weighed the evidence carefully and his findings are well-reasoned. Applying the very narrow standard of review articulated by the Supreme Court in *Pullman Standard v. Swint,* we are not prepared to say the district court clearly erred in finding the evidence insufficient to show segregative intent.

Plaintiffs' second argument relies on an opinion of this court recently affirmed by the Supreme Court, *Washington v. Seattle School District No. 1,* —— U.S. ——, 102 S.Ct. 3187, 73 L.Ed.2d 896 (1982). Plaintiffs contend that defendants' policy of using wide-scale busing for numerous purposes, but not for integration, draws the same sort of impermissible racial classification that was condemned in *Seattle School District No. 1.* We disagree.

In *Seattle School District No. 1,* Washington voters approved an initiative that sought to prohibit "direct or indi-

rect" student assignments to a school other than the one "geographically nearest or next nearest the student's place of residence . . . and which offers the course of study pursued by such student." See Wash.Rev.Code § 28A.26.010 (1981). The initiative contains such broad exceptions,[1] however, that it became evident the measure was directed solely at desegregative busing. The district court so found.[2]

The Supreme Court agreed with this court and the district court that the initiative drew a racial classification because it prohibited school districts from acting only in matters involving racial criteria. *Id.* at ——, 102 S.Ct. at 3195-96, 73 L.Ed.2d at 907-908. Relying on the principle enunciated in *Hunter v. Erickson,* 393 U.S. 385, 89 S.Ct. 557, 21 L.Ed.2d 616 (1969), and *Lee v. Nyquist,* 318 F.Supp. 710 (W.D.N.Y.1970), the Court struck down the initiative as an unconstitutional attempt to restructure the political process to place obstacles in the path of racial minorities. As the Court explained, "In the absence of a constitutional violation, the desirability and efficacy of school desegregation are matters to be resolved through the political process. For present purposes, it is enough that minorities may consider busing for integration to be 'legislation that is in their interest,' " and an initiative that restructures the political

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[1]The initiative permits the school board to assign a student beyond his neighborhood school if he "requires special education, care or guidance" or if "there are health or safety hazards, either natural or man made, or physical barriers or obtacles . . . between the student's place of residence and the nearest or next nearest school" or if "the school nearest or next nearest to his place or residence is unfit or inadequate because of overcrowding, unsafe conditions or lack of physical facilities." Wash.Rev.Code § 28A.26.010 (1981).

[2]"Except for racially-balancing purposes, Initiative 350 permits local school districts to assign students other than to their nearest or next nearest schools for most, if not all, of the major reasons for which students are at present assigned to schools other than the nearest or next nearest schools." *Seattle School District No. 1 v. Washington,* 473 F.Supp. 996, 1010 (W.D.Wash. 1979).

process so as to bar minorities from achieving such legislation cannot stand under the Fourteenth Amendment. —— U.S. at ——, 102 S.Ct. at 3197, 73 L.Ed.2d at 909.

The distinction from our case is apparent. We have been cited to no legislation in California that disrupts or interferes in any way with the decision-making authority of school districts.[3] Indeed, the basis for plaintiffs' complaint is entirely inconsistent with the theory advanced in *Seattle School District No. 1.* Plaintiffs contend, in essence, that the San Jose Unified School District enjoys entirely *too much* discretion in desegregation matters, in that the district has consistently refused to revise its policy on busing for integration. But because the school district's policy does not violate the Fourteenth Amendment, plaintiffs' only recourse is the political process which, in contrast to the process examined in *Seattle School District No. 1,* remains entirely open to them.

III. FACULTY-STAFF ASSIGNMENTS

At trial, school district officials conceded that Spanish-surnamed teachers were assigned to predominantly Spanish-surname schools. The officials claimed that the assignments were for educational purposes, such as providing role models for students and making Spanish-speaking teachers available. Due to lack of evidence, however, the district court was unable to conclude that the disproportionate assignment of Spanish-surnamed teachers and staff resulted from those racially-neutral purposes. 518 F.Supp. at 641.

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[3]If legislation did exist that removes certain powers from school districts, it would not, of itself, be objectionable. "[T]he political majority may generally restructure the political process to place obstacles in the path of everyone;" the constitutional infirmity obtains only "when the state allocates governmental power nonneutrally, by explicitly using the racial nature of a decision to determine the decisionmaking process." *Washington v. Seattle School District No. 1* —— U.S. ——, ——, 102 S.Ct. 3187, 3195, 73 L.Ed.2d 896, 907 (1982).

On appeal, plaintiffs characterize the district court's discussion as a finding that defendants' faculty-staff assignment policies were unconstitutional. Citing Fed.R.Civ.P. 15 (b), plaintiffs request this court to remand with instructions to allow an amended complaint in light of the evidence adduced at trial on this "unconstitutional" practice. We believe the district court's opinion makes clear that the faculty-staff issue was not tried independently, but only as an element of evidence to prove segregative intent.[4] Thus, we will not permit a conforming amendment under rule 15(b), *see* C. Wright & A. Miller, *Federal Practice and Procedure* § 1489, at 449 (1971), particularly since plaintiffs never pursued that theory nor sought an amendment from the district court during some eleven years of litigation. If the school district's alleged practice continues today, these proceedings are not res judicata to a subsequent suit for an injunction. In this regard, we express no opinion on the constitutionality of the school district's faculty-staff assignment policy.

IV. STATE-IMPOSED DUTY TO INTEGRATE

Dayton and *Columbus* make clear that units of government which had a dual system of schools before *Brown v. Board of Education,* 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955) (Brown II), are under an affirmative duty to "eradicate the effects of that system." *Dayton,* 443 U.S. at 537, 99 S.Ct. at 2979, 61 L.Ed. at 733; *Columbus,* 443 U.S. at 458-59, 99 S.Ct. at 2946-47, 61 L.Ed.2d at 677. Plaintiffs here urge that any time a school district has an affirmative duty to integrate, under *Dayton* and *Columbus* a *presumption* of segregative intent arises from evidence of actions with foreseeably segregative consequences. Emphasizing that school

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[4] "However, this court is concerned, in the context of this suit, only with any effect that this assignment policy had on the segregation of the student population of the schools." 518 F.Supp. at 641.

districts in California are under a state-imposed duty to alleviate desegregation, plaintiffs argue that such a presumption should arise here.

Plaintiffs' reasoning is faulty on two grounds. First, the "presumption" plaintiffs refer to in *Dayton* was actually a burden imposed on the school district of "showing that actions that increased or continued the effects of the dual system serve important and legitimate ends." *Dayton*, 443 U.S. at 538, 99 S.Ct. at 2979, 61 L.Ed.2d at 734. It was clearly not a presumption shifting the burden of proving segregative intent, for proof of segregative intent in that case was unnecessary. Second, any duty imposed by state constitutional law has no effect on this proceeding other than as a circumstantial evidence of segregative intent. We have been curious from the outset why, if such an affirmative duty existed under state law, plaintiffs did not proceed in the more attractive state forum.[5] In any event, the forum plaintiffs did choose properly limited its consideration of the state law duty to proof of the segregative intent necessary for a federal constitutional violation. 518 F.Supp. at 642. The district judge's finding that school officials were justifiably confused about the scope of their duty is soundly based in the record and his finding that failure to comply with the state duty did not suggest segregative intent is not

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[5]Until 1979, the California Constitution empowered state courts to order desegregation measures regardless of whether the segregation was *de jure* or *de facto* in origin. *See Crawford v. Board of Education*, 17 Cal.3d 280, 130 Cal.Rptr. 724, 551 P.2d 28 (1976). In 1979, California voters ratified Proposition I, an amendment to the due process and equal protection clauses of the state constitution. Proposition I conforms the power of state courts to order pupil school assignment and transportation to that exercised by federal courts under the Fourteenth Amendment to the United States Constitution. Proposition I was upheld in *Crawford v. Board of Education*, ____ U.S. ____, 102 S.Ct. 3211, 73 L.Ed.2d 948 (1982).

clearly erroneous. Accordingly, the district court's judgment is

AFFIRMED.[6]

FARRIS, Circuit Judge, dissenting:

Minority students are not the only ones who suffer the harmful effects of segregation. All the other students in the segregated system, as well as teachers and administrators, are victims when minority students are removed from the mainstream of public education. The loss is not limited to those within the school system but is borne by all of us who have a stake in the future of this nation. If the limits of the law compel us to perpetuate the exclusion of minorities from the mainstream of our national life, we must do so only after the most careful deliberation.

If the law of desegregation continues to develop in what the majority conceives as its present direction, it will be all but impossible for a minority litigant to make the showing of "segregative intent" necessary to establish that an undeniably segregated school system has been *unlawfully* segregated. There is no dispute that the San Jose public school system is racially imbalanced. The record leaves no doubt that the Board was fully aware that their chosen course of action over a period of two decades would perpetuate this segregation. The Board does not deny this.

In tort law a person is deemed to "intend" the reasonably foreseeable consequences of his actions. In cases of racial discrimination, however, the foreseeable segregative effect of institutional action will not, in and of itself, support a finding of "segregative intent." *See Dayton Board of Education v. Brinkman,* 443 U.S. 526, 536 n. 9, 99 S.Ct. 2971, 2978 n. 9, 61 L.Ed.2d 720 (1979). This more rigorous intent standard, however, does not require that patterns of be-

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[6]In so doing, we endorse the perceptive admonition of Chief Judge Peckham in the Conclusion of his exhaustive and thoughtful opinion of July 15, 1981. 518 F.Supp. at 644.

havior which serve no other end than to maintain and perpetuate a segregated public school be characterized as unintentional.

The record reflects that for twenty years and more the Board of Trustees of the San Jose Unified School District has known that the public schools of San Jose were improperly segregated. It has done nothing to correct the situation, even though it has had numerous opportunities for reform. Although I have the utmost respect for the trial judge, I disagree with his conclusion that the record demonstrates that the Board maintained a sincere commitment to desegregation in spite of its failure to act. The Board's actions speak louder than its words. It is not disputed that the Board has taken no action to accomplish its stated goal of a desegregated system. The district court found that "the district has clearly gotten cold feet on a number of occasions and has failed to follow through on its claimed goal of desegregating the district." *Diaz II,* 518 F.Supp. at 638. There is nothing in the record or in the district court's analysis to support its conclusion that "the desire [to desegregate] often expressed is real, even if there has been some reluctance in the execution." *Id.*

The district court found and the record shows that there were abundant opportunities for actions which would promote desegregation. Whenever the Board was presented with a choice, whenever it had an opportunity to change direction, it made the choice that confirmed and perpetuated segregation in the San Jose public schools. Such consistency in the face of the undeniable fact of segregation is, in my opinion, a clear expression of the "segregative intent" necessary to support a finding of unlawful segregation.

The effect of the majority opinion is to hold that a reluctant school board that talks about desegregation but refuses to do anything to promote it has done all that the constitution requires. I fear that the effect of the majority's position

will be that a school board that wishes to maintain a segregated system in the future will need only discuss its goals of desegregation, commit itself on paper, and then reject or refuse to take advantage of every opportunity for reform. We cannot permit "segregative intent" to be so easily camouflaged.

I do not ignore the district court's admonition that "[t]his court would be extremely disturbed and saddened if its decision in this case was interpreted by either of the parties to this action or the public as encouragement to the Board to lay back and accept the consequences of the imbalance." *Id.* at 644. I simply find it insufficient to address the fact that the public schools of San Jose are segregated and the Board has wilfully rejected every proposal to improve the racial imbalance. The district court expresses its concern about the future. This action was brought to correct the evils of the present. Having prevailed on this sordid record, the Board need never act to reform this school system.

I recognize the narrow limits imposed on our review by Fed.R.Civ.P. 52(a) and *Pullman-Standard v. Swint,* 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982). Even so, I find that the district court, in an admirably thorough and articulate opinion, erred in finding that certain actions of the Board did not demonstrate the "segregative intent" necessary to support a finding of unlawful segregation. Nothing in the record supports the district court's speculation that "[i]t may well be that the Board hoped that some other solution to the problem of integration could be found, short of large-scale bussing." *Diaz II* at 637.

My concern is reinforced by the district court's finding that the Board consistently refused to implement other suggestions for reducing the racial imbalance in the San Jose schools. These suggestions included the creation of magnet schools and education parks, as well as the implementation of open enrollment and voluntary bussing. The

district court found "perfectly reasonable and rational explanations" for the Board's refusal to implement any of these proposals. *Id.* at 638. The *only* support in the record for such a conclusion is the finding that the Board believed that nothing short of busing could remedy the racial imbalance in the San Jose schools, but the record also shows that the Board refused even to consider busing as a remedy. In fact, the Board refused to consider implementing *any* proposal which might have reduced the racial imbalance of the San Jose public schools.

Further, the district court's conclusion that the Board's behavior during the bond issue election campaign did not support an inference of "segregative intent" is not consistent with the undisputed facts. The Board issued public statements that the failure to pass the bond issue would result in the transfer of students from one attendance area to another. It also gave repeated assurances that it would not use bond issue money to finance busing for the purpose of desegregation, although busing for other purposes was widely used throughout the system. I conclude that the message of those two statements upon the voters in San Jose was "if you don't vote for the bond issue, we will have to desegregate" and "if you do vote for the bond issue, we promise not to use the money to desegregate." This, together with the court's findings, is more than sufficient to support an inference of "segregative intent."

The Board rejected all of QUEST's recommendations for correcting the racial imbalance. In spite of this, the district court concluded that "the Board was trying its best, in a difficult situation, to continue to move forward towards some affirmative effort to integrate." *Id.* at 640. There is no evidence in the record that the Board ever "move[d] forward" or was "continu[ing] to move forward." The district court set forth its rationale for refusing to find inferences of "segregative intent":

To make such an inference would be to warn all school districts which have racially imbalanced schools not to make

any affirmative moves towards integration unless they are certain that they will succeed; otherwise, the effort will become the basis for an inference of discriminatory purpose on their part, rather than an inference of the very opposite intent which in fact motivated them. *Id.* at 641. I agree that a finding of "segregative intent" would broadcast a message to other segregated school systems, but I disagree with the district court on the substance of that message. A finding of "segregative intent" here would signal school boards that it is not enough merely to talk about desegregation while avoiding all proposals that might remedy the evil. I must respectfully reject the district court's conclusion that even if "the Board ultimately did little to implement its stated commitment to integration," it nevertheless merits congratulations for "its willingness to stick by this position [in favor of integration], even if just rhetorically." *Id.* at 641.

I recognize that the federal constitution does not require the Board to integrate the public schools of San Jose. The Board's only obligation is that it not segregate intentionally. The record and the district court's findings compel my conclusion that the Board failed to meet this obligation. I would reverse with instructions to fashion a remedy to correct the unconstitutional segregation in the San Jose public school system. It is of no comfort to the plaintiffs that the district court concluded that "[c]ontinued failure to choose the path which leads towards less ethnic imbalance in the schools could well, at some future time, form the basis for a conclusion that the school officials do, in fact, wish to keep the Anglos and the Spanish-surnamed students segregated in the SJUSD." *Id.* at 644. More than twenty years have elapsed with no break in this continuing failure. This, in my opinion, is sufficient to support an inference of "segregative intent."

I would reverse.

Appendix D

Arnulfo M. DIAZ, et al., Plaintiffs,

v.

SAN JOSE UNIFIED SCHOOL DISTRICT, et al., Defendants

No. C-71-2130 RFP (SJ)

UNITED STATES DISTRICT COURT, N. D. CALIFORNIA

July 15, 1981.

MEMORANDUM AND ORDER

PECKHAM, Chief Judge.

I PROCEEDINGS

This suit was originally instituted in 1971. Plaintiffs, on behalf of a class of all Spanish-surnamed students enrolled in the San Jose Unified School District ("SJUSD") and their parents, charged that the School District was operating a segregated public school system in violation of the equal protection clause of the Fourteenth Amendment of the United States Constitution and 42 U.S.C. § 1983. Jurisdiction is founded in 28 U.S.C. §§ 1343(3) and 1343(4).

This case is now before the Court on remand from the Ninth Circuit Court of Appeals, 612 F.2d 411 (1979), after this court initially ruled in favor of the defendants after trial on the merits. 412 F.Supp. 310 (1976). The procedural history of this matter up until the point of that initial judgment in this court, as well as the general factual background of the case, may be found in our initial opinion, 412 F.Supp. at 311-15, and need not be repeated here. The Ninth Circuit, upon appeal, vacated the judgment of this court and remanded the matter to us for further proceedings, in light of the decisions of the United States Supreme Court in *Columbus Board of Education v. Penick,* 443 U.S. 449,

99 S.Ct. 2941, 61 L.Ed.2d 666 (*"Columbus"*), and *Dayton Board of Education v. Brinkman,* 443 U.S. 526, 99 S.Ct. 2971, 61 L.Ed.2d 720 (*"Dayton"*) (1979), and in light of the Circuit Court's opinion issued in conjunction with the remand.

After the Ninth Circuit's mandate issued in February of 1980, this court ordered both sides to brief and argue their proposals for further proceedings in light of the remand decision. After a hearing held on June 4, 1980, this court ordered the case decided on the existing evidentiary record, and instructed both sides to file briefs addressing the question of whether the Ninth Circuit opinion remanding this case and the decisions in *Columbus* and *Dayton* compel a result different from this court's previous judgment. Oral argument was held on this issue on October 31, 1980.

This court has conducted an extensive review and consideration of this matter. We have studied the Ninth Circuit's remand opinion and the two Supreme Court rulings, as well as other Supreme Court and lower court cases which have addressed issues relevant to this matter. We have conducted a complete review of the transcript of the original trial on the merits, as well as the transcripts of the hearing on the request for a preliminary injunction, which was conducted in 1971. We have also carefully re-examined the exhibits introduced into evidence by both sides in connection with this case. The court concludes that it must once again find in favor of the defendants. For the reasons discussed below, the evidence in the record does not, on balance, support a finding of segregative intent, a finding necessary under federal law in order to impose liability on the defendants.

II DAYTON AND COLUMBUS

On remand, the Ninth Circuit ordered that this court reconsider the evidence in this case in light of the Supreme

Court decisions in *Dayton* and *Columbus,* which were decided on the same day at the end of the October 1978 Term.

Dayton involved a school system which the Court of Appeals had found was *de jure* segregated at the time of the decision in *Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954) (*"Brown"*). As such, it was under a continuous affirmative duty since that time to dismantle that dual system, "to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Green v. County School Board,* 391 U.S. 430, 437-38, 88 S.Ct. 1689, 1693-94, 20 L.Ed.2d 716 (1968); *see also Columbus,* 443 U.S. at 458-59, 99 S.Ct. at 2947. The Court of Appeals had found that in a number of different instances, the Dayton school authorities had failed to take steps to fulfill this affirmative obligation to dismantle the segregated system. The Supreme Court's decision upheld the conclusions of the Court of Appeals 1) that there was a *de jure* system of segregated schools in place at the time of the decision in *Brown v. Board of Education, supra,* 2) that this meant that the school district was under an affirmative obligation since that time to dismantle that segregated system, and 3) that the school district had failed to fulfill that obligation.

The case before this court is in a much different posture. There was no evidence, nor any contention by the plaintiffs, that a *de jure* system of segregated schools existed at the time of *Brown.* Rather, virtually all the evidence in this case focused on the actions of the school authorities commencing in 1963, when the school board first acknowledged the need to eliminate segregation. Having not established any pre-*Brown de jure* system of segregation, the plaintiffs cannot rely on any continuing obligation on the part of the school district to dismantle such a segregated system by affirmative acts of integration. Rather, the plaintiffs are obliged to show that the segregation which exists in the schools was brought about by purposeful discrimination by

state officials. As this court noted in its prior decision, 412 F.Supp. at 328-29, *Keyes v. School District No. 1*, 413 U.S. 189, 93 S.Ct. 2686, 37 L.Ed.2d 548 (1973) established that evidence of the *de facto* segregation of schools is not sufficient to prove a violation of the fourteenth amendment; rather, the plaintiff must prove not only that the defendants' actions created or maintained racial or ethnic imbalance in the schools, but also that those actions were motivated by segregative intent.

This, of course, brings us to the heart of the problem facing the courts and the crux of the difficulties which led the Court of Appeals to remand this case to this court. From what actions, circumstances, and explanations is the court to infer segregative intent? What evidence supports such an inference, and what countervailing evidence is sufficient to counter such an inference?

The Supreme Court offered some guidance on this issue in *Dayton*. It stated that proof of foreseeability is not to be taken, as a general proposition, to make out a *prima facie* case of segregative intent, nor does it routinely shift the burden of persuasion to the defendants. The court then stated, "[o]f course, as we hold in Columbus today, . . . proof of foreseeable consequences is one type of quite relevant evidence of racially discriminatory purpose. . . ." 443 U.S. at 536 n.9, 99 S.Ct. at 2978 n.9. The Court rejected any hard and fast rule on the inferences to be drawn from, and importance to be placed on, evidence that state officials took actions which would have the natural, probable and foreseeable consequences of perpetuating segregation. The Court considered it simply one of many types of evidence which must be weighed in the balance of the overall case.

The decision in the *Columbus* case contains more guidance applicable to the case presently before this court. In that case, the lower courts had found that, while there was a *de jure* system of segregation in place in Columbus at the

time of the *Brown* decision, there had also been several acts of intentional segregation after 1954. In upholding the latter finding of the district court, the Supreme Court pointed to several types of evidence of direct relevance to the San Jose situation. The Court noted in particular the evidence in the record concerning the selection of sites for new schools in Columbus. Since 1950, 103 schools had been built in Columbus; 87 opened with racially identifiable student bodies. The Court noted that this segregative result was "reasonably foreseeable under the circumstances in light of the sites selected." It went on to note, however, that there was no need to rely on an inference of discriminatory purpose based on the reasonable foreseeability of the segregative consequences of the district's choice of sites, for the record reflected that the school board had been specifically warned about the segregative consequences of its actions and that alternatives had been proposed which would have increased integration. 443 U.S. at 462-63 n.11, 99 S.Ct. at 2980 n.11.

The Court also put great emphasis on the fact that the board of education was presented with many recommendations over the years which would have countered some of the segregation in the Columbus system; the school board consistently refused to follow up on any of those recommendations. These failures to act were particularly important because "the Columbus system grew rapidly in terms of geography and number of students, creating many crossroads where the Board could either turn toward segregation or away from it." 443 U.S. at 463 n.12, 99 S.Ct. at 2980 n.12. Under all these circumstances, the Supreme Court upheld the district court's inference of segregative intent " 'from the Columbus defendants' failures, after notice, to consider predictable racial consequences of their acts and omissions when alternatives were available which would have eliminated or lessened racial imbalance.' " *Id.*, *quoting* 429 F. Supp. 229, 240 (S.D.Ohio 1977).

The Court, in *Columbus*, also reiterated the use of evidence of foreseeable segregative effect to infer segregative intent. It emphasized, as it did in *Dayton*, that evidence of foreseeable consequences of actions, without more, is not sufficient to establish a constitutional violation. The Court stressed that the issue to be addressed by the trial court is whether or not the state officials acted with a "forbidden purpose." Foreseeable effects is simply one kind of evidence among other types from which an inference of intent or purpose can be drawn. Again, the Court made it clear that the role of the trial court is to weigh this evidence, along with, and in the context of, all the rest of the evidence, and decide whether an inference should be drawn that the state officials made the decisions which led to the segregative result with discriminatory or segregative intent. 443 U.S. at 464-65, 99 S.Ct. at 2950.

III *OTHER SUPREME COURT CASES*

The court has also re-evaluated the record in this case in light of three other decisions handed down by the Supreme Court since the trial of this case. These decisions all attempt to demark more clearly the barrier in the law between actions which result in segregation or disparate impact on a racial or ethnic group and actions which are motivated by the intent or purpose to discriminate. The latter actions are subject to liability under federal law; the former are not.

In *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), the Supreme Court rejected the notion that discriminatory impact of, or result from, state action is sufficient to support a finding of a constitutional violation. The Court insisted that a discriminatory purpose had to be found to make out a violation under the Fourteenth Amendment. *Id.* at 239-42, 96 S.Ct. at 2047, 2049. That purpose had to be found from the examination of the totality of the facts, and while impact might on occasion suffice to

show discriminatory intent, this would be true in those cases where the decisions or actions which caused the discriminatory impact were not explainable on nonracial grounds. *Id.* at 242, 96 S.Ct. at 2049.

The type of evidence which might be relied on to infer discriminatory purpose was further elaborated on by the Supreme Court in *Village of Arlington Heights v. Metropolitan Housing Development Corporation,* 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977). In that case, the Court reiterated that the discriminatory purpose of the decision-makers had to be shown to be at least a motivating factor in their actions. Evidence of discriminatory impact, while perhaps providing some support for such a finding in the overall context of the specific case, was not in and of itself sufficient. *Id.* at 265-268, 97 S.Ct. at 563, 564. The Court listed four other factors, along with impact, which might be determinative of the issue of discriminatory purpose: 1) the historical background of the decision; 2) the specific events surrounding the decision; 3) any departures from the normal procedure of decision-making; and 4) any legislative or administrative history related to the issue or subject decided. *Id.* There is no indication that this list was meant to be exhaustive of the evidence to be looked to by the trial court in determining the issue of discriminatory purpose. It is simply illustrative of the process in which the trial court must engage in deciding whether the objective facts support an inference of the ultimate relevant subjective fact, intent to discriminate.

Finally, the Court shed further light on the role of the foreseeability of discriminatory impact of a decision in the trial court's evaluation of intent in *Personnel Administrator of Massachusetts v. Feeney,* 442 U.S. 256, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979). In the course of rejecting a claim of unconstitutional discrimination against women in the operation of Massachusetts' veteran preference laws, the Court explicitly rejected the idea that the foreseeability of the

discriminatory impact of an action is, in and of itself, sufficient to support a finding of discriminatory intent and, hence, of liability. The Court wrote:

> "Discriminatory purpose," however, implies more than intent as volition or intent as awareness of consequences. . . . It implies that the decision-maker . . . selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.

Id. at 279, 99 S.Ct. at 2296 (citation omitted; footnotes omitted). The court again, however, made it clear that the necessary intent must generally be gleaned from objective evidence, and an important aspect of that inquiry is the results achieved or avoided by the officials' actions. *Id.* at 279 n.24, 99 S.Ct. at 2296 n.24. Also important is the inevitability or foreseeability of the adverse impact. *Id.* at 279 n.25, 99 S.Ct. at 2296 n.25. But the Court cautioned, "an inference is a working tool, not a synonym for proof." *Id.* In the case the Court was considering, it conceded that an inference of discriminatory intent might be drawn from the inevitability of the adverse impact on women of the statute in question, but the legitimacy of the underlying legislative policy and the rest of the evidence mitigated that inference and prevented it, in the Court's analysis, from "ripen[ing] into proof." *Id.*

These three cases lend further support to the guidelines to our inquiry found in *Dayton* and *Columbus*. The court is to focus clearly on the question of segregative intent. The inevitability and foreseeability of racial imbalance resulting from official decisions is relevant evidence to be weighed, but it is not probative without further examination of the context of, and other evidence concerning, the actions and decisions of the officials. Inferences to be drawn from the effects of decisions must be supported by the other evidence, or there can be no finding of liability. Otherwise, the court would be holding the state officials responsible for the con-

sequences of their decisions, rather than holding them responsible only when the court is convinced that the decisions were at least in part motivated by an improper intent or purpose. This, the Supreme Court has made repeatedly clear in recent years, would be improper.

IV *THE NINTH CIRCUIT OPINION*

The Ninth Circuit, in remanding this case, explicitly disclaimed any intention to direct this court on how to balance the evidence in this case on the ultimate question of segregative intent. 612 F.2d at 416 n.2. Nor did the Court suggest that any of the findings of fact made by this court were inaccurate or erroneous. Rather, the Ninth Circuit's difficulty arose with the manner in which this court articulated the process of weighing the evidence and drawing a conclusion as to the existence of segregative intent. As this court reads the Circuit Court's opinion, it was concerned with the following aspects of this court's prior decision: 1) the acts and decisions by the school authorities as recounted by this court, 412 F.Supp. at 315-28, all either exacerbated or did nothing to improve the racial balance in he San Jose schools, 612 F.2d at 414; 2) to mitigate whatever suggestion of intent arose from those actions, the defendants appeared, from our recitation of the facts, to rely solely on the fact that their decisions were based on the application of a racially neutral and consistently applied neighborhood school policy. *Id.* This court's decision could be read, and was read by the Circuit Court, to suggest that the district's racially neutral neighborhood school policy "constituted either a complete defense to a charge of segregative intent, or, completely dispelled the inferences of segregative intent that flowed from the [plaintiffs'] proof." *Id.* at 415.

The Ninth Circuit held that the simple invocation of a neighborhood school policy, without a more complete analysis of its origins, its application, and the available alternatives, is not a defense, in and of itself, to the inferences

of segregative intent which arose from the plaintiffs' proof. *Id.* The district court's attention must remain focused on the ultimate factual issue: segregative purpose. How the invocation of a neighborhood school policy impacts on that ultimate fact depends on a lot more than the simple fact of its existence. This is particularly true because the fact of a neighborhood school policy does not, on its face, have any impact on decisions such as the location and size of new schools, and the choice of old schools to close. *Id.* In fact, as the Circuit Court pointed out through its lengthy quotation from *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 20-21, 91 S.Ct. 1267, 1278-79, 28 L.Ed.2d 554 (1971), decisions on site location and size of schools (and, likewise, decisions on which schools to close), when combined with a neighborhood school policy, will define the neighborhood and have reciprocal effects on the racial and ethnic composition of other schools in the district. Moreover, these very choices have a profound effect on the further developments of neighborhoods: the opening of a racially identifiable school is likely to result in the further segregation of the housing patterns in the neighborhoods served by that school.

For all these reasons, the Circuit Court was concerned that this court's earlier opinion seemed too quick to accept the simple invocation of a neighborhood school policy as a ready and sufficient explanation to dispel any inferences of segregative intent which arose from the consistent and foreseeable segregative results of virtually all the decisions and choices made by school officials which were discussed in our initial decision. While one judge of the three-judge circuit panel felt that this court had demonstrated that it had carefully weighed all the competing evidence before concluding that there was insufficient evidence of segregative intent, the majority felt that our apparent complete reliance on the defense of the neighborhood school policy required that the case be sent back to this court for a more

complete weighing of the evidence in light of the majority's admonition that "[s]trict adherence to a neighborhood policy is no more than circumstantial evidence that bears upon the existence or nonexistence of segregative intent. The existence of such a policy is not enough to prove the absence of segregative intent." *Id.* 612 F.2d at 416.

With the guidance of the Supreme Court cases and the Ninth Circuit opinion in mind, the court now turns back to the evidence in this case.

V *FACTS*

There is little quarrel with the findings of fact made by this court in its initial decision. The plaintiffs have stated that they "have never quarreled with the vast majority of the Court's findings of evidentiary facts." Plaintiffs' Memorandum in Support of Judgment on Remand, filed August 4, 1980, at 11. The defendants, while making suggestions for additional findings of fact, have not disputed as clearly erroneous any of the findings of the initial opinion. Nor did the Court of Appeals suggest that its remand was based on any dispute over the findings of fact which this court made in its decision. On the contrary, the Court of Appeals felt that this court, given those facts, had not justified sufficiently either its unwillingness to draw an inference of segregative intent from those facts or its willingness to infer a complete defense to any such inferences in the existence of a consistent and neutral neighborhood school policy. Therefore, this court is prepared to rely principally on the organization and factual findings of its initial decision. Some additional findings will be made, but these are not in the nature of contradictory or radically new departures from the initial decision. Rather, they are based on additional evidence, readily discoverable in the record of this case, which helps to fill in the picture of the school officials' actions in the manner demanded by the Court of Appeals.

The findings of fact in this case, as set out in this court's initial opinion, found at 412 F.Supp. 310, are hereby incorporated into this opinion, except as modified in the discussion which follows.

In order to comply as completely as possible with the Circuit Court's instructions, the court will discuss the evidence under the same categories as it did in its initial opinion and attempt to explain, to the satisfaction of the Court of Appeals, why the court does not feel that the evidence, on balance, supports a finding of segregative intent by the school officials of the San Jose Unified School District.

As a preliminary matter, the court wishes to highlight certain general facts concerning this district which are crucial to understanding the ultimate findings of this court. These facts are all found in our initial decision, but they bear emphasis by repetition here in light of the Ninth Circuit's concerns.

This district is long and narrow in shape, extending approximately 16 air miles in length and varying in width from a maximum of four miles to a minimum of one and one-half air miles. The evidence in this case did not indicate any manipulation of the boundaries of this district such as would raise suspicions that the demarcation of the district itself was designed to perpetuate segregation. The only changes made in the boundaries of the district since 1950 have been the annexations in 1956 of the Sunol School District and the Almaden Elementary School District. There is no evidence that these annexations had any segregative purpose or effect.

The demographic developments since World War II have been such that most of the Spanish-surnamed persons live in the northern, downtown section of the district, and most of the Anglos live in the southern, suburban part of the district. Through no fault of the school authorities or any

other state officials, at least as far as the record of this case demonstrates, one can now draw a line across the district, north of which the student population is 60.5% Spanish-surnamed, south of which only .07% is Spanish-surnamed. 612 F.2d at 413. This demographic reality, combined with the shape of the district, severely limits and complicates available remedies for segregation, unlike other cases, where the two populations are not separated by a number of attendance zones. *See, e.g., Adams v. United States,* 620 F.2d 1277, 1298-99 (8th Cir.), *cert. denied,* 449 U.S. 826, 101 S.Ct. 88, 66 L.Ed.2d 29 (1980).

Finally, there is little or no dispute that the vast majority of schools in the SJUSD are racially imbalanced. While there was some reluctance shown by the defendants at trial to define racial imbalance by a certain percentage figure, the parties talked throughout the trial about those schools which were identified by the State of California under its guidelines as substantially imbalanced. That was defined as any school with a percentage of pupils of one or more ethnic groups which differed by more than 15 percentage points from the percentage of that racial or ethnic group in the total student population of the district. *See* 412 F.Supp. at 314. In 1968, the state identified 41 out of 50 schools in the SJUSD as racially imbalanced, and there is no doubt that this concentration continued and intensified right through the time of the trial of this case. *Id.* There is also no question that the district was well aware at least since 1964 that this substantial imbalance existed and was getting worse. *Id.* at 315-16.

A. *Site Selection and School Construction*

As already noted, the selection of sites, along with the choice of sites to eliminate, is a crucial issue in this re-evaluation of the evidence. Not only is the selection of sites and the size of schools not dictated by a neighborhood

school policy in and of itself, but these decisions can play a crucial role themselves in defining the nature and make-up of a neighborhood.

As we found in our earlier opinion, 412 F.Supp. at 316-17, since 1965 nine new schools have been sited and constructed in the San Jose Unified School District. All of these schools opened racially imbalanced. While the district failed to consider the state guidelines on evaluating attendance areas, the fact is that, absent a major reformation of the attendance patterns in the entire district and a complete abandonment of the concept of neighborhood schools, the formal consideration of the state guidelines would have had no effect on the selection of sites and the construction of these schools.

Virtually all the increase in school age population over the past three decades has occurred in the southern section of the district. There has been a virtual explosion of new subdivisions in these essentially suburban areas, with many new families, often with children, moving in. The overwhelming majority of these people are Anglos.

There is nothing constitutionally suspect about building new schools where there is rapid increase in school age population. While it is true that suspicions would be properly aroused if the district was closing schools that appeared to be becoming racially mixed and simultaneously opening new schools farthest from the area where the majority group resides, *Swann v. Charlotte-Mecklenburg Board of Education, supra,* 402 U.S. at 21, 91 S.Ct. at 1278-79, there is no evidence of such manipulation in this case. Rather, the district simply responded to the needs presented by the population growth. These new areas were so far from the downtown areas, and the new construction represented such a small percentage of the total facilities in the district, that the need for new schools did not present a very good opportunity by itself to help integrate the dis-

trict. There is no suggestion in the record of such readily available alternatives to the construction of these new schools in the new areas of population growth that the failure to seize on those opportunities could be fairly characterized as demonstrating segregative intent.

B. *The Field Act Schools*

Perhaps the most disturbing evidence facing the court concerns the decisions made surrounding the reconstruction of what are referred to as the "Field Act" schools. Sixteen schools were closed at the end of the 1971 school year because, under the Field Act, Cal.Ed.Code § 15451 *et seq.* and § 15501 *et seq.*, they were considered unsafe. See 412 F.Supp. at 317.[1] Most of these schools were located in the downtown area of the district, and, of particular interest to our considerations, some of these schools were located towards the southern portion of the downtown area, close to attendance areas which had a greater proportion of Anglo students.

Perhaps the most disturbing decision which was made at that time was to rebuild on their old sites three schools, Washington, Gardner, and Wilson, despite a recommendation from the Westinghouse Learning Corporation[2] to

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[1]Although under state law the district still had a couple of years to replace the pre-Field Act facilities, a major earthquake in the Los Angeles area in February of 1971 led the school board to vote to close all pre-Field Act schools at the end of the school year and to establish a Building Master Plan Task Group for the purpose of planning and constructing new facilities for the students displaced by these closures by the fall of 1972.

[2]The Westinghouse Learning Corporation was commissioned to make recommendations on ways to improve racial balance in the course of the major construction made necessary by the closure of the Field Act schools. This report was officially submitted to the Building Master Task Group, although the record indicated that the school board and other school officials were aware of the report's contents and recommendations.

do otherwise, and despite the objections of a member of the Board of Education (and its former President) Mrs. McCreath that such a decision would perpetuate segregation unnecessarily.

However, a number of pieces of evidence mitigate against an inference that this decision, as ill-advised as it might have been, was motivated by segregative intent. First, the principal pressure which resulted in this decision seems to have been exerted by the local committee of the Building Master Plan Task Group in the Washington-Gardner-Wilson area, which was concerned that it would lose its neighborhood schools.[3] Second, despite the specific recommendation concerning these schools from the Westinghouse Learning Corporation study, the study also made it clear that real progress towards integration of the San Jose Schools could only be made through the use of two-way bussing. The shifting of attendance lines, and thereby reshuffling a few students who lived near the center of the district, would not make much difference. Therefore, Dr. Charles Knight, the Superintendent of the SJUSD, testified that the district chose to follow a rebuilding program "that would not get in the way of a two-way exchange of students." Reporter's Transcript at 611. Third, the Board did, finally, move to transfer a section of the Washington attendance area, known as the Little Orchard section, to the River Glen attendance area. The Little Orchard area

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[3]When the Building Master Task Group was established, local committees were organized around each of the five High School Attendance areas. While there was evidence introduced that, in hindsight, some officials thought that this method of organization undermined the elements of the community favoring changes which would result in greater ethnic balance in the schools, there is no evidence to suggest that this was anything more than a strategic error; there is no evidence that the Task Group was organized in this manner for the purpose of undermining integration, nor is there any evidence in fact that anyone could have or did predict that this organizational decision would cause this result.

is almost 100% Spanish-surnamed Americans, and it is slightly closer to the River Glen than to the Washington school. There was some evidence at trial that the Board refused to make the transfer for a long time because of pressure from those already residing in the River Glen attendance area. The fact that the Board did voluntarily make the transfer, despite the resistance, can only help dispel any inference that the Board acted with a segregative purpose in mind. Finally, the Board ultimately decided not to rebuild the Wilson Junior High School, which was the most heavily segregated Junior High in the district.[4] Plaintiffs tried to argue that this decision is evidence of segregative intent. The court, however, as discussed *infra*, p. ——, thinks this decision also serves to help dispel any inference of segregative intent arising from the school officials' other actions.

The school district also chose to house students in temporary portable classrooms on the sites of the Field Act schools while the buildings were being reconstructed, rather than make any attempt to disperse them to other schools in the district in a manner which might have improved racial balance. However, while a few schools in the district had some excess capacity, most schools were operating at or over capacity, or were operating so close to capacity that it would not have been practical to attempt to fit a few more students into the available slots. Certainly, to make those transfers and disrupt the attendance patterns of students—moving them out of their community, separating friends, throwing children into a new environment from which they will then be removed in a year or two—for just

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[4]There is some evidence in the record that the Airport Land Use Commission would have moved to prevent the rebuilding of the Wilson school on the old site because it was in the flight path of the San Jose Municipal Airport. However, the question never went as far as formal condemnation hearings. *See* Reporter's Transcript at 1375-77. For further findings concerning the decision not to rebuild Wilson, see 412 F.Supp. at 321.

the interim period of construction does not appear to this court to be so compelling an option that an inference of segregative intent should be drawn from the failure to seize the opportunity.

The evidence did show a very few instances where the undercapacity of a heavily Anglo school was sufficient and the school was close enough to a heavily Spanish-surname school that a transfer could have been accomplished even within a concept of neighborhood schools. Those instances are few in number and there was no evidence that the school officials affirmatively considered and rejected these alterations in the attendance patterns. At best, the evidence indicates that the school officials did not make as great an effort as possible to identify and seize on every available instance where a transfer of students to a nearby school operating at slightly under capacity would have improved ethnic balance. Under these circumstances, and in the context of the rest of the evidence in this case, this court does not think it proper to infer from this failure to seize on opportunities to integrate proof of an intent to segregate.

C. *School Closures*

School closures, like the selection of new schools, can play an important role in helping the courts identify a segregative purpose of a school district which claims to operate under a neutral neighborhood school policy. The decision to close certain schools and disperse their students to some schools and not others can provide evidence that the attendance areas of the neighborhood school policy were delineated in a manner designed to continue racial separation. *Taylor v. Board of Education of City School District of New Rochelle,* 191 F.Supp. 181, 195 (S.D.N.Y.), *affirmed,* 294 F.2d 36 (2d Cir.), *cert. denied,* 368 U.S. 940, 82 S.Ct. 382, 7 L.Ed.2d 339 (1961). This is the type of evidence with which the Ninth Circuit was particularly concerned in sending this case back to court.

The evidence surrounding school closings in this case, however, considering all the circumstances, does not support a finding of segregative intent. Declining enrollment in the northern part of the district led to a couple of instances where schools were closed and the attendance area combined with contiguous areas. In each instance, the students of the closed school ended up in a new school which was less imbalanced than their old school. Since most of the schools in the northern area are imbalanced to begin with, the reciprocal effect of these consolidations was that the receiving school became more heavily imbalanced. The plaintiffs do not seem to dispute that, if the school district only considered consolidation with contiguous areas, it did the best job it could. However, plaintiffs contend that the failure to consider alternatives, such as bussing students to schools in the southern end of the district, provides evidence of segregative intent. Plaintiffs' counsel, in fact, repeatedly referred to the consolidation of attendance districts in the northern end of the district as the "downtown shuffle."

However, the court must look at this evidence while bearing in mind that it cannot judge the district's actions against a duty to integrate the schools. *Johnson v. San Francisco Unified School District,* 500 F.2d 349, 351 (9th Cir. 1974); *Soria v. Oxnard School District Board of Trustees,* 488 F.2d 579, 587 (9th Cir. 1973), *cert. denied,* 416 U.S. 951, 94 S.Ct. 1961, 40 L.Ed.2d 301 (1974). While the decision to continue to draw attendance areas which were contiguous and which approximated as closely as possible the concept of a neighborhood school had the foreseeable effect of continuing the imbalance in the schools, the decision not to depart from the neighborhood school policy in order to bus students a great distance to the already overcrowded southern schools, on double sessions, cannot be attributed to segregative intent. The perfectly sound educational reasons for preserving a true neighborhood school policy, the district's desire to push forward with decentralization, and the fact that the district chose, in each instance, the redistribution of the students to contiguous areas resulting in

the most beneficial effect in terms of racial balance for the students being reassigned, all counter any inference of segregative intent which might arise from the foreseeable effect of the refusal to bus. The result may have been continued segregation, but the court does not feel that the balance of evidence on this point suggests that the district acted with an unconstitutional purpose.

Nor is there any evidence that the choice of schools to close was motivated by any segregative intent. In fact, the decision to close the Wilson school and disperse its students to three neighboring schools seems to have been motivated, at least in part, by a desire to eliminate the most heavily segregated Junior High School. The change resulted in an improvement of the racial balance for all the former students at Wilson. Moreover, the transfer of some of those Wilson students to the Markham Junior High School resulted in a marked improvement in the racial balance of that school, which went from 7.2% Spanish-surnamed to 18.4% Spanish-surnamed. From the perspective of the other schools involved in the change, the already existing imbalance was made worse. But the school officials' willingness to make changes like these, which result in some mitigation of the segregation for some pupils, counters any inference arising from other evidence that the officials' actions were generally motivated by a discriminatory purpose.

Similarly, the decision to close the Bascom school was necessary, since the school was located on land belonging to the City College, which wanted the site back by 1973. The combination of that attendance area with Trace resulted in the best possible improvement in ethnic balance for the students from Bascom.

The Belden site was turned over to the continuing education high school for the perfectly rational reason that it was located in an industrial area and so was conveniently situated for programs involving on-site training. College

Park was closed because of problems caused by the close proximity of the municipal airport, and Jefferson was closed as one of the unsafe, pre-Field Act schools. These schools were reasonably combined with the Bachrodt school, because 1) it had the largest site, 2) this area was historically served by one school before the population increase had forced the division of the area, and 3) College Park was separated from Hester by railroad tracks, which would have increased the need for transportation for safety reasons.

Longfellow and Roosevelt were also closed because they had been built prior to the Field Act and were considered unsafe. Neither school was rebuilt.[5] Both schools were heavily imbalanced technically. The students were reassigned to schools, Hester and Burnett (and San Jose High School, *see infra,* pp. 634-635), respectively, which resulted in an improvement of the racial balance from the perspective of the students who had formerly attended the closed school.

These choices, therefore, do not seem to support an inference of segregative intent. It is true that the district did decide against a major reformulation of the attendance patterns by instituting bussing to schools further south. In each of these instances of closing, there is no doubt that the possibility for instituting such a plan was brought to the school officials' attention by a group or individual. However, the refusal to abandon a neighborhood school policy, without more, in order to integrate cannot be the basis for inferring segregative intent; otherwise, we would in effect be imposing a duty to integrate on school districts whose segregation is attributable to residential segregation unrelated to the actions of school and other state officials.

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[5]Longfellow was apparently not rebuilt because of the construction of a new highway at or near the site of the school. *See* Reporter's Transcript at 1375.

That we are forbidden to do. *See Brody-Jones v. Macchiarola*, 503 F.Supp. 1185, 1248 (E.D.N.Y.1979) (No duty to desegregate schools whose imbalance was caused by other factors, such as demographic trends, unrelated to actions of the school district); *see also infra*, pp. 642-644.

With the decision to close the Wilson and Roosevelt Junior High Schools permanently came a restructuring of the grades of the downtown junior high schools and high schools. Formerly, all junior high schools in the SJUSD were three year schools, and all high schools were also three year schools. However, the school board decided to restructure the schools so that the downtown junior high schools—Burnett and Hoover—became two year schools, and the downtown high schools—Lincoln and San Jose—became four year schools. The junior high schools and high schools in the rest of the district remained on the old 3-3 plan. *See* 412 F.Supp. at 321.

Two aspects of these changes resulting from the decision to close, and not rebuild, Wilson and Roosevelt are particularly disturbing. First, the restructuring decisions resulted in two different feeder systems, one for the area which was predominantly Spanish-surnamed, and one for the area which was predominantly Anglo. Certainly, the use of different feeder patterns for schools dominated by different racial or ethnic groups could form the basis for a finding of segregative intent, for it could provide evidence that feeder patterns were being manipulated for the purpose of channeling the two groups into different high schools. *See, e. g., Morgan v. Kerrigan*, 509 F.2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963, 95 S.Ct. 1950, 44 L.Ed.2d 449 (1975). Second, the transfer of students resulted in Hoover Junior High School transforming from one of the district's few racially balanced schools to an imbalanced school. *See* 412 F.Supp. at 321-22.

However, unlike the evidence of the manipulation of the feeder patterns in *Morgan v. Kerrigan, supra,* these changes do not appear to this court to be designed to channel racial or ethnic groups apart. As already noted, the changes resulted in a better ethnic balance from the point of view of the students being transferred from the closed schools. Moreover, part of these series of changes included the transfer of some students to the Markham Junior High School, which made that school racially balanced. Finally, the changes in structure are not part of a pattern of manipulations and affirmative actions which could only be explained, *in toto,* as motivated by segregative intent. The court is convinced, on the basis of all the evidence, that this restructuring was simply the only alternative that the school officials saw to a major restructuring of the attendance patterns of the district. These changes allowed them to preserve the concept of neighborhood schools, which is not in and of itself constitutionally suspect. *See infra,* pp. 642-644. And since the evidence does not unambiguously point towards a further separation of the ethnic groups, but rather shows, from some perspectives and for some students, an improvement in the racial balance of the schools they attended, the court is not prepared to find that any inference of discriminatory purpose which might arise from this one differentiation in the feeder patterns of the northern and southern schools and from the resulting imbalance at the Hoover school rises to the level of proof of segregative intent, either by itself or combined with the rest of the evidence in this case. Too many pieces of evidence point the other way for this court to draw that conclusion from those which point towards such an inference.

D. *Portables and Double Sessions*

As our earlier decision noted, 412 F.Supp. at 322-23, the school district uses portables extensively throughout the district. A number of schools in the north were, at the time

of trial, made up exclusively of portable classrooms; portables were used to construct schools on the sites of Field Act schools after the old buildings were condemned and while new buildings were being constructed. In the south, the rapidly growing population forced the extensive use of portables to relieve overcrowding until new facilities could be built. (The problem in the southern end of the district was, of course, exacerbated by the repeated failure of bond issues on the ballot during the years from 1969 right up through the time of the trial on this matter, which prevented needed construction of new schools.) Moreover, testimony at trial indicated that the Board of Trustees of SJUSD, in planning a new school, builds the school with a capacity under the estimated maximum number of students who will be using the facility during its lifetime, in order to avoid having a great deal of excess space when enrollment is below peak. Therefore, the need for the use of some portables—at the time of peak enrollment—is automatically planned into construction decisions.

It is true, as noted in our initial decision, 412 F.Supp. at 322, that the school district has never used portables to increase integration. This, of course, was always an alternative available when a need for portables arose; the school district could always have opted to place new portables at the other end of the district from the area of overcrowding, and then bus the students to that end of town. But to suggest that the failure to take that extreme action indicates segregative intent seems unreasonable to this court. Because the need for portables at a particular location at either end of town was considered temporary—in the north until the new Field Act schools were constructed, in the south until bond issues were passed by the voters to build new schools to handle the growth in population—any integration based on the use of portables would be temporary at best. Moreover, courts have acknowledged that efforts to maintain the concept of neighborhood schools is

a perfectly reasonable educational choice, as long as it does not operate as a mask for a desire to maintain segregation. *United States v. Texas Education Agency,* 564 F.2d 162, 168-70 (5th Cir. 1977), *cert. denied sub nom., Austin Independent School District v. United States,* 443 U.S. 915, 99 S.Ct. 3106, 61 L.Ed.2d 879 (1979); *Smiley v. Vollert,* 453 F.Supp. 463, 481 (S.D.Tex. 1978); *see infra,* pp. 642-644. In this instance, the decision to maintain neighborhood schools while new schools were being built, rather than sending the students temporarily across town, for distances which would have to be, for the most part, fairly substantial, seems to this court to be perfectly explicable for racially neutral reasons, and does not provide sufficient grounds for inferring proof of segregative intent.

The continued use of double sessions is more troubling, because it is acknowledged that double sessions are educationally disadvantageous. Therefore, the fact that bussing students a long distance is also considered by many to be educationally disadvantageous carries less weight as an explanation when the alternative is also so considered.

However, the evidence does not, on balance, indicate that the problem of double sessions could have been alleviated to any great extent by bussing students from the southern to the northern schools. While some of the northern schools were operating at undercapacity, for the most part they were not operating very far under capacity, and few students could have been transferred without causing the northern schools to go also on double sessions. Moreover, some of the figures concerning undercapacity masked the reality that all the available space was being utilized in the northern schools. For instance, there was testimony at trial from Dr. Knight that the compensatory education programs which were available for students in many of the downtown schools provided for lower student-to-teacher ratios and also provided for additional support personnel, who needed to use some of the space for their work. Reporter's Transcript at 1338-39.

Again, the need for double sessions was perceived by school officials to be a temporary situation, until new schools could be built. These new schools would be built where the students lived, in line with the neighborhood school policy. Therefore, any alleviation of segregation which would come from sending the students to northern schools would have been temporary. It would have resulted, moreover, in simply spreading the double session problem throughout the district, thereby increasing the number of students adversely affected by this unfortunate situation. Under these circumstances, the decision not to bus the students already on double session to northern schools, while clearly having the foreseeable effect of bypassing another opportunity to increase integration, at least temporarily, does not provide a basis for inferring proof of segregative intent from the actions of the school officials.

E. *Transportation*

The court's basic findings and conclusions on this issue remain virtually the same from those made in its initial decision. *See* 412 F.Supp. at 324, 332. There was evidence introduced at trial that there is a great deal of bussing used in the SJUSD, both in terms of the number of students being transported (approximately one-third of the student population) and in terms of the money expended (over $850,000 per year). However, except for transportation to special schools and programs, there was no evidence that there is or has ever been any bussing outside of the attendance areas, which have not been shown to have been established or gerrymandered in any way that suggests segregative intent. Nor was there any evidence introduced showing that students could have been bussed equivalent distances to a more integrative setting.

The school officials readily admitted that bussing was necessary even within the neighborhood school concept. Besides the obvious need for transportation over relatively

short distances for safety reasons, and the need for transportation of students who attend special schools, the natural fluctuations in the concentration of school age population in one area or another will always necessitate some deviation from the ideal of students always living within walking distance of their schools. Particularly when the school age population is relatively sparse, the necessity that schools be at least a certain size in order to justify needed facilities and programs means that attendance areas must, at times, be so large that some, even a great number of students, will have to be transported to the school.

There is no evidence in the record, however, suggesting that the school officials in the SJUSD did not strive for the best approximation of the "walking distance" ideal, or that they manipulated the use of bussing in one area or another for discriminatory purposes. The bussing in the south was readily attributable to the larger attendance areas which existed as the population there first began to move in, and was unfortunately prolonged by the repeated failure of the school district to receive the authorization from the voters to build more schools. These would have presumably eliminated a great deal of the bussing in the southern part of the district. In the north, the principal bussing was attributable to the consolidation of districts as the need for some schools had been eliminated. Nor was there any evidence offered which suggested that the distances from school ever became so great that the underlying benefits deriving from a neighborhood school policy and the decentralization it allows—other than the ability to walk to school —were ever threatened or eliminated.

The visuals attached to the affidavit of Roy B. Bursch, filed December 17, 1971,[6] provide a good representation of

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[6]A similar set of visuals were introduced by the defendants in the trial on the merits, identified as defendants' Exhibit H. Upon return of the materials in this case to this court from the Court of

how changes in population allow for the shrinking of attendance areas and the elimination of the need for transportation. Visual number three in particular shows how the growth in population in the downtown area during the 1950s allowed the College Park-Jefferson-Grant attendance areas to be subdivided. In more recent years, the reversal of that population trend has reversed the trend in schools, so that much of that population is now once again served by one school, Bachrodt, which covers a large area and therefore necessitates the use of buses to transport students. The response to these trends by the school district has been neutral and even-handed, and there has been no evidence introduced which suggests that any actions in this area have been motivated by segregative intent. Absent evidence that similar amounts and distances of transportation could have been used to alleviate racial imbalance, the court sees no basis for inferring segregative intent from the use of bussing by the school district within the context of the neighborhood school policy.

One other aspect of the transportation issue leaps out at anyone examining the record in this matter. As noted in our earlier opinion, 412 F.Supp. at 324, the evidence indicates that Dr. Knight, the Westinghouse Learning Corporation, and the Building Task Force all concluded that the only realistic solution to the segregation in the SJUSD would be some form of two-way bussing. There is evidence that the Board of Trustees and all other school officials recognized that, ultimately, the school district could not be integrated without bussing. Yet the Board has repeatedly made it clear that it is opposed to bussing for the purpose

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Appeals, however, those visuals were missing. Neither plaintiffs nor defendants were aware of their location, nor could they provide duplicates. The court, however, is certain that the visual referred to, which was introduced at the preliminary injunction stage of the proceedings, accurately depicts the changes which were also shown in the aforementioned Exhibit H.

of integration. Plaintiffs' counsel, at the trial, repeatedly returned to this argument and ultimately appeared to consider this evidence the most compelling of their case: in the face of the knowledge that the SJUSD would be desegregated only with some form of two-way bussing, the Board of Trustees consistently refused to consider any proposal for bussing and repeatedly went on record as publicly opposed to large-scale bussing for the purpose of integration.

It may well be that the Board hoped that some other solution to the problem of integration could be found, short of large-scale bussing, which it properly recognized would meet resistance from the community, both Anglo and Spanish-surnamed. There is also some evidence that the Board, in its various pronouncements throughout the years, did not mean to rule out the possibility of some bussing in connection with a plan for integration. Rather, the statements suggest that the Board promised the community that there would not be any change in the traditional methods of school assignments without plenty of notice to the community and plenty of opportunity for input into the process by citizens of the SJUSD.

Nonetheless, this apparent resistance to bussing is particularly disturbing in light of the Board's refusal to institute other suggestions throughout the years which would have had some effect on the pattern of racial imbalance. Suggestions for magnet schools, education parks, open enrollment, and voluntary bussing have received, at best, cursory consideration from the school board. In each instance, however, there were perfectly reasonable and rational explanations for the decision not to adopt the proposal.

Accordingly, on this record the court does not see sufficient evidence to justify a finding of segregative intent simply from the refusal of the school officials to adopt any of the proffered alternatives, including bussing, to the

neighborhood school policy. The incidents are relatively few in number, there are reasonable explanations, other than segregative purpose, for them, and there are other actions and statements by the Board which show some concern with and attempts to alleviate segregation. While the district has clearly gotten cold feet on a number of occasions and has failed to follow through on its claimed goal of desegregating the district, it is, of course, under no constitutional duty to do so. The court is convinced that the desire often expressed is real, even if there has been some reluctance in the execution. This evaluation, combined with those actions which have helped, to some small degree, to alleviate some of the worst imbalances, convinces this court that the foreseeable maintenance of segregation which resulted from other actions and refusals to act by the school board does not support, in this instance, an inference of segregative purpose. The refusal to date to consider bussing, despite a recognition that it is probably the only solution to the problem of racial imbalance in the SJUSD, is the most damning of the evidence against the school district, but it is not sufficient, in the context of the rest of the evidence in this case, to support a finding of liability.

F. *Bond Issue Elections*

The major point concerning the bond elections which plaintiffs pressed at trial and our initial findings highlighted, 412 F.Supp. at 324-25, is that various public comments by the school board in connection with the effort to get the growth issues passed in the years 1971 through 1973 offered 1) the carrot that the bond money would not be used to subsidize bussing (and reiterated the Board's own continued disinclination to use bussing for integration purposes) and 2) the stick that failure to pass the bond issue would result in (a) alterations in the neighborhood school policy to spread double sessions throughout the district and (b) the need to send students from the northern end of the district to the south, and/or vice versa. It is of course

interesting to note that despite these so-called threats and promises made in connection with the bond elections, allegedly designed to appeal to people's segregative inclinations, none of the bond issues in connection with which these statements were made were passed by the voters.

One factual finding made in our initial decision, 412 F.Supp. at 332, needs to be clarified. The bond issue passed in 1969 for the rebuilding of the Field Act schools contained a provision which stated that the funds raised by the bonds would not be used to purchase new sites. However, it did not, in fact, require that the schools be built on the same sites: old sites could be sold and the proceeds used to purchase a new site. Presumably, in fact, funds raised by such a sale could also be supplemented by money from other sources to pay for the purchase of a new site. Building the Field Act schools in different locations might have been made more difficult by this provision in the bond issue, but it did not require that the same sites be used. Therefore, there is little basis for drawing any inference of segregative intent from the wording of the bond issue, since it did not close the door to the reconsideration of the location of the Field Act schools. Moreover, as the court stated in the first decision, 412 F.Supp. at 332, since we find that the actual decision to rebuild most of the Field Act schools on site does not support a finding of segregative intent in the context of the other evidence in this case, this language in the bond issue, which did not even require that the schools be built on site, does not provide any stronger basis for an inference of segregative intent.

The court also reiterates its earlier findings, 412 F.Supp. at 332, concerning the Board's statements issued in connection with the bond issue campaigns. The court has reexamined those materials carefully. The statements concerning the spread of double sessions and the need to transport students to the other end of the district if the various issues did not pass seem, in context, to be simply realistic

factual statements of the results which would flow from the failure of the bond issues to pass. These statements are just some, among others, made in the literature concerning the possible repercussions of the failure of the bond issues. There is no particular emphasis given to them, nor, in context, is there any suggestion that the school board meant to do anything but point to the many burdens which would be placed on the students and the district in general by such a failure of the bond issue to pass.

The repeated assurances that the bond money would not be used to finance bussing also fail, in this court's judgment, to support a finding of segregative intent. If the school district ultimately decided to adopt some sort of bussing plan, there was no evidence that the funds from these bond issues would be needed to finance such a plan. Certainly if there is no affirmative constitutional obligation to integrate, there is no such obligation to bus to integrate. And there is even more certainly no constitutional infirmity in promising not to use particular funds for that purpose. If that is the case, it would seem highly improper to put much weight on the fact that the district made such a promise in this instance. Again, in a stronger case, such a promise might add secondary support for a finding of unconstitutional intent based on conduct from which such an inference could be more confidently drawn. In the context of this case, where the rest of the evidence of the district's actions, in the context which they occurred, do not provide a strong basis for an inference of discriminatory purpose, the fact that it promised not to use these particular funds for bussing does not add much weight in favor of that inference.

G. *Quest*

As the findings in our initial decision stated, 412 F.Supp. at 325, the school board established QUEST (Quality Urban Education Study Team) in 1969 to formulate proposals to

desegregate the schools of the SJUSD. While the Board did not ultimately adopt any of QUEST's proposals, our initial findings concerning the school board's relationship with QUEST requires further elaboration. For instance, there is evidence on the record that the Board itself did issue statements indicating that it did not favor mass bussing, and there are some indications that school officials encouraged QUEST not to make any proposals which might be inflammatory immediately prior to the bond elections. However, prior to the "opening up" of the QUEST membership, there is no evidence that the Board attempted to direct the findings of QUEST or to otherwise interfere with its operations. To the contrary, the evidence indicates that school officials did their utmost to ensure, when QUEST was organized and began its work, that articulate, concerned representatives of all segments of the community were involved, and to ensure that those involved in QUEST desired to develop proposals to integrate the school system, not to sabotage the effort. This evidence helps, in fact, to counter other evidence from other actions which might raise an inference that the Board acted with segregative intent.

Under pressure from members of the community who feared the outcome of QUEST's work, the Board did agree to open up QUEST to more people, and did so at a meeting attended mostly by people opposed to the work of QUEST. However, the evidence also indicates that the Board made subsequent efforts to recruit more people from other, more supportive segments of the community to join in the effort and to presumably counter-balance the influx of people hostile to QUEST's mission. Even the former chairman of QUEST testified that he favored the general notion of opening up QUEST to a broader membership, but objected to the manner in which the Board did it and the circumstances in which it acted. The Board's action did result in a disruption and delay of the work of QUEST, as the new people were integrated into the work of the various sub-

committees (which also had to be expanded in number to accommodate all the new people) and were educated in the previous work of QUEST. It must be noted, however, that despite the time and manner in which the membership of QUEST was re-opened, the final report of the reconstituted QUEST did recommend a plan for integrating the schools, which included the use of magnet schools, open enrollment, and voluntary bussing. The minority report also recommended integration, through the use of educational parks.

While the Board does seem to have, at certain points, succumbed to pressure from persons hostile to the work of QUEST, the overall picture presented suggests that the Board's initial organization of QUEST, and the efforts both then and at the later point of reconstitution to ensure that the community was well represented and that persons sympathetic to the work of QUEST were in the positions of leadership in both the original and reconstituted organization, does not support an inference of discriminatory purpose in the Board's relationship to QUEST. And while the Board did modify its charge to QUEST, down-grading integration from the "primary objective" to a "long term ... priority," the court does not see this essentially political move as particularly decisive, either for the work of QUEST or for the likelihood of integration or continued segregation in the SJUSD. Under these circumstances, this example of the Board's concession to those hostile to the work of QUEST does not support a finding of segregative intent.

Indeed, the Board's persistence in seeing the work of QUEST go forward, in attempting to protect it from being overwhelmed by those hostile to its work, and in continuing, despite pressure, to encourage QUEST to formulate proposals for the integration of the district—even if for the long term—seems to the court to support a finding that the Board was trying its best, in a difficult situation, to continue to move forward towards some affirmative effort to

integrate. The fact that it seems to have not followed through ultimately on that effort, by not acting on QUEST's proposals, may mean that it has abandoned this affirmative effort to integrate. But its efforts certainly do not, therefore, become the basis for inferring an intent to segregate. To make such an inference would be to warn all school districts which have racially imbalanced schools not to make any affirmative moves towards integration unless they are certain that they will succeed; otherwise, the effort will become the basis for an inference of discriminatory purpose on their part, rather than an inference of the very opposite intent which in fact motivated them. Not only would this be the wrong position for the courts to take as a matter of policy but, as long as there is a distinction in the law between *de facto* and *de jure* segregation, such an approach would seem altogether improper.

H. *Faculty and Staff Assignment*

Under the law, school districts may not assign staff and faculty to certain schools on the basis of race or ethnicity. *See United States v. Montgomery County Board of Education,* 395 U.S. 225, 89 S.Ct. 1670, 23 L.Ed.2d 263 (1969), and other cases cited for this point in our initial opinion, 412 F.Supp. at 333. A discriminatory pattern of assignment of faculty and staff "[is] among the most important indicia of a segregated school system." *Swann v. Charlotte-Mecklenburg Board of Education, supra,* 402 U.S. at 18, 91 S.Ct. at 1277; *Adams v. United States, supra,* 620 F.2d at 1290; *Arthur v. Nyquist,* 573 F.2d 134, 144 (2d Cir. 1978); *United States v. State of Texas,* 498 F.Supp. 1356, 1372 (E.D.Tex.1980). The courts have made it clear that benign motivations behind the decision to assign faculty and staff on the basis of race does not mitigate the fact that the assignment has been made on an unconstitutional basis.

Officials of the school system admitted at trial that Spanish-surnamed teachers were assigned to predominantly

Spanish-surname schools for educational purposes. These purposes basically amounted to providing role models for the students and making available Spanish-speaking teachers. As noted, the court does not believe that the law allows assignment on the basis of race even if motivated by the former purpose. The court believes that the latter purpose might have been proper if there was evidence that the district simply attempted to assign Spanish-speaking faculty and staff to schools with a high percentage of Spanish-speaking students and that such a policy resulted naturally in the assignment of a disproportionate number of Spanish-surnamed teachers and staff to schools with a disproportionate number of Spanish-surnamed students. As our initial findings of fact reflected, 412 F.Supp. at 333, however, there was no evidence introduced showing that the district investigated the need for Spanish-speaking teachers at those schools, or made any attempt to identify teachers or staff who spoke Spanish—who were either Anglo or Spanish-surnamed—for the purpose of assigning them to those schools. Therefore, the court cannot conclude that the disproportionate assignment of Spanish-surnamed teachers and staff to those schools resulted from that racially neutral policy.

However, this court is concerned, in the context of this suit, only with any effect that this assignment policy had on the segregation of the student population of the schools. Such an effect could result from the racial identifiability of the school caused, at least in part, by the make-up of the faculty and staff. *Adams v. United States, supra,* 620 F.2d at 1290. Despite the grossly disproportionate percentages of Spanish-surnamed faculty and staff assigned to predominately Spanish-surname schools, *see* 412 F.Supp. at 325, the small number of Spanish-surnamed teachers and staff in the SJUSD means that no school has a large percentage of Spanish-surnamed faculty and staff. As this court previously found, *id.*, one school had a faculty that reached 26 percent Spanish-surnamed at one time, and another had a

24 percent Spanish-surnamed faculty. Otherwise, the percentage remained below 15 percent in any one school. These percentages are too low, in the court's opinion, to cause a school to have become ethnically identifiable because of the policy of assignment of faculty and staff. Whatever the discriminatory nature of the assignment policy, therefore, this court sees no basis for concluding that the assignment policy affected the racial imbalance of the student population of the schools. Moreover, the benign purposes which lay behind the district's policy does convince the court that we should not use the assignment policy as support for inferring segregative intent from any of the school officials' other acts which had the foreseeable effect of perpetuating racial imbalance in the schools.

I. *Board Policy and State Statutory Requirements*

The court stands by its earlier findings and conclusions as to the Board's policy and the state statutory requirements vis-a-vis integration, 412 F.Supp. at 326-28, 333-34, and we will simply elaborate on those findings and conclusions. The court feels that the Board's oft-repeated commitment to integration can only weigh in the district's favor and against an inference of segregative intent. The repeated statement of this policy does, of course, make it undoubtedly clear that the school officials were well aware of the continuing existence of severe ethnic imbalance in their schools; but even without those statements, there is no way that the Board of Trustees and all other high officials of the school district could not have been well aware of the situation. And it is true that the Board ultimately did little to implement its stated commitment to integration. But under the circumstances of this case, where there never was an affirmative duty to integrate, the fact that the Board was repeatedly willing to commit itself on paper to looking for a solution to the problem of imbalance should not be turned on its head and used to support an inference of segregative intent. If the actions taken by the Board do not themselves form the basis for such a finding, the court does

not see how the Board's willingness to state openly that its object and purpose is to promote integration provides the missing foundation for such an inference. The Board should at least be given credit for its willingness to stick by this position, even if just rhetorically, despite the apparent opposition among many residents of the district to any such effort. At worst, the statements carry no weight one way or the other. The court, however, feels they are worth something more than that. The statements, combined with the persistent attempts to encourage the development of some proposal which would increase ethnic balance in the district's schools, however limited and however often the Board ultimately failed to follow through on the resulting proposals, do help, to some degree, to offset some of the other evidence which, it could be argued, suggests an inference of segregative intent.

As to the effects of the existing state policies, statutes and guidelines, it is important to keep in mind that this action does not include any pendant state claims or any direct allegations of violation of state law. The record repeatedly reflects that fact that the plaintiffs raised the arguments concerning state law only in so far as the alleged failure to follow the guidelines and policies might support an inference of segregative intent under the standards of federal law.

In this context, the court reiterates the key findings on this issue made in its earlier opinion, 412 F.Supp. at 327-28, 334. While the state generally had some policy to encourage efforts to integrate imbalanced schools from 1962 until 1972, the specifics of that policy and the extent of the district's obligations did vary a great deal over that period. Therefore there is no basis for inferring segregative intent from the Board's failure to act in any specific manner. It is true that the Board responded to the state's continuing exhortations to integrate with references to the opportunity provided by the rebuilding of the Field Act schools

and to the effort represented by the formation of QUEST, neither of which the Board in the end took advantage of to make much progress toward integration. Nor did the district take advantage of resources, such as those provided by the state's Bureau of Intergroup Relations, which would have assisted with the process of integration.

But again, these facts must be looked at in the context of the duty under federal law, which is the duty not to act with segregative intent. The court has herein found that the district's various substantive decisions do not support, in the context of all the evidence in this case, an overall conclusion that the school officials operated with an intent to segregate. We have also held that the district's failure to follow through on the few efforts it began towards finding a solution to the problem of ethnic imbalance in its schools does not support an inference of segregative intent; rather, to some extent they help mitigate evidence supporting an inference of segregative intent. The court likewise does not see how the district's failed attempts to comply with state policy and guidelines support such an inference. Again, those few attempts should be weighed in the district's favor; the fact that it ultimately did not actually decrease the imbalance in its schools during this period does not change the fact that the attempts provide evidence in the defendants' favor on the question of their intentions and purposes, especially given that under federal law there is no duty to integrate, simply a duty not to segregate purposely.

J. *Neighborhood School Policy*

On remand, the examination of the SJUSD's neighborhood school policy remains central to the issues faced by this court. The Ninth Circuit stated that the invocation of a neighborhood school policy is not a defense, in and of itself, to a series of factual conclusions which support an inference of segregative intent. 612 F.2d at 415. The issue to be

decided by this court, after looking at all the facts on the record, is whether or not it is proper to make an inference that segregative intent lay behind the actions of the Board of Trustees of the SJUSD when it took the various actions which knowingly perpetuated ethnic imbalance in the schools. But this issue cannot be decided without an evaluation of the district's neighborhood school policy, for most of the decisions made by the Board were explained in this action by reference to the neighborhood school policy. Much of the ultimate conclusion of this court on the question of segregative intent must be based on an evaluation of the role played by this policy, the motivations behind the district's adherence to it, and the propriety under the law of the district's staunch reliance on it to justify its actions.

This court's finding that the facts in this case do not support an inference of segregative intent, therefore, is based in large part on its conclusion that the neighborhood school policy was developed and has continued to be embraced by the district's officials because of a sincere belief in its beneficial effects on the educational process and not in order to use such a policy to perpetuate segregation. The racial imbalance in the schools is a result of residential and demographic changes. There is no evidence in this case of gerrymandering of attendance areas, use of optional attendance zones, transporting of students across contiguous attendance areas, and other actions which in other cases have put the lie to the assertion of a neutral neighborhood school policy. Nor is there any evidence in this case that, despite the existence of a consistently and neutrally applied neighborhood school policy, an inference of segregative intent should be drawn from the SJUSD's selection of sites, the closure or abandonment of schools, or the assignment of faculty and staff. *Arthur v. Nyquist, supra,* 573 F.2d at 144-45; *N.A.A.C.P. v. Lansing Board of Education,* 559 F.2d 1042, 1049-57 (6th Cir.), *cert. denied,* 434 U.S. 997, 98 S.Ct. 635, 54 L.Ed.2d 491 (1977); *United States v. Texas*

Education Agency, supra, 564 F.2d at 169-70; *Armstrong v. O'Connell,* 451 F.Supp. 817, 829-30 (E.D.Mich.1978); *Berry v. School District of Benton Harbor,* 442 F.Supp. 1280, 1325-26 (W.D.Mich.1977). Moreover, the evidence does not suggest that the past acts of the school board have contributed significantly to the residential segregation of the attendance areas. If such had been the case, there might have been grounds for holding that the present assertion of a neighborhood school policy was designed to perpetuate segregated schools. *Taylor v. Board of Education of City School District of City of New Rochelle, supra,* 191 F.Supp. at 195-96. *See also* the discussion and cases cited in our initial opinion, 412 F.Supp. at 334-35. Finally, there was no evidence introduced in this case which supports a finding that other actions by state officials caused or contributed to the segregation in the residential patterns of the SJUSD which, combined with the elongated shape of the district, results in the racial imbalance of schools organized along neighborhood lines.

Under these circumstances, there is no reason to condemn the school district for its decision to stick with the concept of neighborhood schools. *Smiley v. Vollert, supra,* 453 F.Supp. at 481. As the Supreme Court wrote in *Dayton Board of Education v. Brinkman,* 433 U.S. 406, 413, 97 S.Ct. 2766, 2772, 53 L.Ed.2d 851 (1977), "The finding that the pupil population in the various . . . schools is not homogeneous, standing by itself, is not a violation of the Fourteenth Amendment in the absence of a showing that this condition resulted from intentionally segregative actions on the part of the Board. *Washington v. Davis,* 426 U.S. 229, 239 [96 S.Ct. 2040, 2047, 48 L.Ed.2d 597]. . . ." Without any evidence of manipulation or bad faith in the adoption and maintenance of a neighborhood school policy, the courts have consistently recognized the reasonableness of the choice by educators and administrators in favor of neighborhood schools. *Brody-Jones v. Macchiarola, supra,* 503 F.Supp. at 1247; *United States v. Texas Education Agency, supra,* 564

F.2d at 168 n.9; *Deal v. Cincinnati Board of Education*, 369 F.2d 55, 60 (6th Cir. 1966), *cert. denied*, 389 U.S. 847, 88 S.Ct. 39, 19 L.Ed.2d 114 (1967). This choice seems particularly reasonable in light of the evidence in the record that the SJUSD wished to move towards more decentralization of school administration and governance.

The court is mindful of the Ninth Circuit's admonition that "we do not believe that a neighborhood school policy, no matter how consistently followed, can be a determinative fact in proving the ultimate fact of forbidden purpose." 612 F.2d at 415.[7] However, in deciding the ultimate question of segregative intent, this court's evaluation of the basis upon which such a policy was developed and maintained will greatly effect the weight given the district's reliance on such a policy. In this case, it is the court's conclusion, after weighing all the evidence, that the adherence to a neighborhood school policy by the school officials in the SJUSD was not a device for maintenance of segregative schools, although that effect was clearly foreseeable and was clearly foreseen by the school officials. Moreover, this good faith belief in the advantages of a neighborhood school policy means that the court does not infer the necessary segregative intent from the various instances where the school officials chose the alternative which preserved the neighborhood school concept, rather than adopt another alternative which would have required the abandonment of that policy. This evaluation of the role played by the neighborhood school policy in the decisions made by the school officials is not only proper, but absolutely necessary to the reaching of a proper conclusion by this court on the issue of segregative intent.

This conclusion concerning the neighborhood school policy, along with the court's evaluation of the other decisions by the district which were only collaterally affected

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[7] (Footnote omitted.)

by the policy, or which were not affected at all by reference to that policy, leads this court to its finding that the evidence does not support an inference of the necessary intent to segregate such as would necessitate a finding of liability. *See Personnel Administrator of Massachusetts v. Feeney, supra,* 442 U.S. at 279, 99 S.Ct. at 2296; *Washington v. Davis, supra,* 426 U.S. at 239-42, 96 S.Ct. at 2047-49.

VI *CONCLUSION*

In conclusion, the court wishes to emphasize an important point made in its earlier decision, 412 F.Supp. at 335-36. This court would be extremely disturbed and saddened if its decision in this case was interpreted by either of the parties to this action or the public as encouragement to the Board to lie back and accept the consequences of the imbalance. Continued failure to choose the path which leads towards less ethnic imbalance in the schools could well, at some future time, form the basis for a conclusion that the school officials do, in fact, wish to keep the Anglos and the Spanish-surnamed students segregated in the SJUSD. So, it should be clear that the Board of Trustees takes a precarious path if it thinks it can continue forever to walk the thin line between a duty to integrate, which does not exist under federal constitutional principles, and the continuing obligation not to segregate intentionally, which would open the district to liability under federal law.

Accordingly, this court orders that judgment be entered in this case in favor of the defendants.

SO ORDERED.

Appendix E

Arnulfo M. DIAZ and Socorro Diaz, as parents and next friends of Fernando Diaz, Miguel A. Diaz and Juan F. Diaz, Jose Vasquez, as the parent and next friend of David Vasquez, Individually and on behalf of all other persons similarly situated, Plaintiffs-Appellants,

v.

SAN JOSE UNIFIED SCHOOL DISTRICT, Charles Knight, Individually and as District Superintendent of the San Jose Unified School District, Neil H. Geier, Jr., Elizabeth J. Allen, Edwin P. Jones, Jr., Mary E. McCreath and Donald L. Raimondi, Individually and as members of the Board of Education of the San Jose Unified School District, Defendants-Appellees.

No. 76-2148

United States Court of Appeals,
Ninth Circuit.

Nov. 5, 1979
Rehearing Denied Feb. 15, 1980.

Before HUFSTEDLER and TANG, Circuit Judges, and SMITH,* District Judge.

HUFSTEDLER, Circuit Judge:

Appellants, parents of Spanish-surnamed children attending public school in the San Jose Unified School District, brought this class action on behalf of themselves and all other parents of children similarly situated seeking desegregation of the school district. They charge that the San Jose Unified School District ("district"), its superintendent, and the members of its Board of Education ("school board") maintained racially imbalanced schools

*Honorable Russell E. Smith, United States District Judge, District of Montana, sitting by designation.

in violation of the Fourteenth Amendment. After a hearing on the merits, the district court found that the school district was racially imbalanced and that the appellees created or maintained the ethnic imbalance, but that in so doing the appellees did not act with "segregative intent," as that term has been construed by the United States Supreme Court and this court. The issue on appeal is whether the district court applied the correct criteria in deciding the segregative intent issue. We vacate and remand the case to the district court for reconsideration in the light of *Columbus Board of Education v. Penick* (1979) ..... U.S. ....., 99 S.Ct. 2941, 61 L.Ed2d 666; *Dayton Board of Education v. Brinkman* (1979) ..... U.S. ....., 99 S.Ct. 2971, 61 L.Ed.2d 720; and the views herein expressed.

The district court's opinion sets forth the factual background of the controversy. (*Diaz v. San Jose Unified School District* (N.D.Cal.1976) 412 F.Supp. 310.) We briefly summarize the pertinent facts.

The challenged school district runs from north to south through central San Jose, California. The district is 16 miles long and from one and one-half to four miles wide. The Spanish-surnamed population is concentrated in the downtown area in the northern part of the district. The Anglo residents are primarily in the southern part of the district, a suburban area. The Spanish-surnamed students make up 24.6 percent of the total student population of the district. In the northern area, the student population is 60.5 percent Spanish-surnamed, representing 78.8 percent of the Spanish-surnamed school children in the district. The student population of the southern-suburban schools is .07 percent Spanish-surnamed. No statutorily mandated "dual system" of segregated schools has ever existed in the district.

For many years, the district adhered to a "neighborhood policy," under which students are required to attend schools

within designated "attendance areas" in which they reside. Although the goal of the policy is to allow students to attend schools within walking distance of their homes, extensive transportation of the students in the district is used, but transportation is only within attendance areas.

Appellees knew, at least as early as 1962, that the district was racially imbalanced. At that time, the school board passed a resolution acknowledging that segregation was inherently harmful. Following state requirements, the school board conducted annual ethnic surveys beginning in 1966 which disclosed a continuing pattern of racial imbalance. The school board reaffirmed its commitment to racial integration in a policy statement issued in 1970.

Since 1965, appellees have undertaken a whole series of actions that maintained the racial imbalance of the district. It also omitted courses of action, readily available to it, that would have ameliorated racial imbalance. Since 1965, the school district has built nine new schools on newly-selected sites. All nine opened as racially imbalanced schools. The district followed state guidelines regarding racial balance in selecting sites in the northern downtown area, but it did not consider the guidelines in choosing sites in the suburban area.

Pursuant to state legislation setting minimum safety standards for schools, the district regularly conducted inspections of all schools. In 1967, the inspections revealed that numerous school buildings in the district failed to meet state safety requirements. After the Los Angeles earthquake in February, 1971, the school board voted to close all unsafe schools at the end of the 1971 school year. Pending reconstruction of the buildings, classes were held in portable classrooms. The school board decided to rebuild most of the unsafe downtown schools on their original sites; no attendance boundaries were changed. Ten of the rebuild schools were racially imbalanced in 1971, and that

condition remained unchanged after reconstruction. Only two schools were balanced in 1971; they remained balanced thereafter. Only two schools were rebuild on different sites; both of those schools were imbalanced both before and after reconstruction. The school board did not consider the impact of reconstruction on existing ethnic imbalance, and it rejected suggestions for rebuilding that would have improved ethnic balance.

Seven of the schools which were closed for failure to meet safety standards were not rebuilt. In reassigning students from the closed schools, ethnic balance was improved from the point of view of the reassigned students, although the ethnic balance at receiving schools was sometimes worsened. Reassignments were made solely to contiguous attendance areas.

The school district owns over 400 portable classrooms, which are distributed to schools on the basis of the individual needs of those schools. The district created seven downtown schools entirely from portables. The school board did not consider using those portable classrooms in a manner to improve ethnic balance. Rather, in response to overcrowding in southern schools, the school board put those schools on double sessions pending construction of new schools. Although the school board recognized that double sessions are educationally undesirable, it did not transport students from the overcrowded southern schools to the underused northern schools. Although some students were transferred to other schools within the southern area, none were transported to non-adjacent schools. The board was fully aware that any improvement in racial imbalance could not be achieved without district-wide bussing. The board nevertheless repeatedly declared itself opposed to bussing for the purpose of integration. In 1963, the board passed a resolution assuring the community of its opposition to bussing for integration, and it has never deviated from this position.

As all parties recognize, when no statutory dual system has ever existed, appellants "must prove not only that segregated schooling exists but also that it was brought about or maintained by intentional state action." (*Keyes v. School District No. 1* (1973), 413 U.S. 189, 198, 93 S.Ct. 2686, 2692, 37 L.Ed.2d 548; *Columbus Board of Education v. Penick, supra,* ..... U.S. at ....., 99 S.Ct. 2941.) The district court succinctly summarized the appellants' contention: "To prove that defendants have operated a segregated school system in violation of the Fourteenth Amendment, plaintiffs first established that the board was fully aware of the existing racial imbalance in the district, and then attempted to demonstrate that ethnic imbalance resulted from defendants' intentional conduct. To prove segregative intent, plaintiffs introduced evidence of the district's educational policies on (1) site selection and school construction; (2) adoption of a neighborhood school policy with board-designated attendance areas; (3) reconstruction of Field Act schools; (4) school closures and student reassignments; (5) location of portable classrooms and maintenance of double sessions; (6) student transportation; (7) presentation of materials supporting bond elections; (8) response to integration proposals by a citizens' committee; (9) faculty and staff assignments and (10) failure to integrate despite a state statutory duty and a publicly-issued board policy to relieve ethnic imbalance." (*Diaz v. San Jose Unified School District, supra,* 412 F.Supp. at 315.)

The impact of these acts and policies of the appellees exacerbated the racial imbalance in a number of schools within the district and improved racial balance in none of them. "Adherence to a particular policy or practice, 'with full knowledge of the predictable effects of such adherence upon racial imbalance in a school system is one factor among many others which may be considered by a court

in determining whether an inference of segregative intent should be drawn.'" (*Columbus Board of Education v. Penick, supra,* ..... U.S. at ....., 99 S.Ct. at 2950.)

To contradict the adverse inferences arising from the appellants' proof, appellees relied solely on their consistent adherence to a neighborhood school policy, which was racially neutral. The district court concluded that consistent adherence to a neighborhood school policy was enough, standing alone, to dispel inferences of segregative intent that arose from the combination of actions and inactions of the appellees resulting in the racial imbalance of which appellants complained.

The district court explained: "The critical issue in this litigation is thus whether a school board may apply a neighborhood school policy." (*Diaz v. San Jose Unified School District, supra,* 412 F.Supp. at 334.) "The evidence shows that defendant School District has adhered to a 'neighborhood school policy,' with the result that ethnic composition of the schools merely reflects residential patterns." (*Id.* at 312.) "If, however, neutral adherence to a neighborhood school policy is constitutional, this court has no authority to intervene and order integration.' (*Id.* at 334.) Thus, as we read the district court's opinion, the district court concluded that the existence of consistently followed neighborhood school policy constituted either a complete defense to a charge of segregative intent, or, completely dispelled the inferences of segregative intent that flowed from the appellants' proof.

We disagree with the district court's characterization of the issue, and, in the light of *Columbus Board of Education v. Penick, supra,* we do not believe that a neighborhood school policy, no matter how consistently followed, can be a determinative fact in proving the ultimate fact of for-

bidden purpose.[1] As usual in a case in which subjective intent is an essential element, existence of that intent can ordinarily be established only by circumstantial evidence. An inference of segregative intent arose from the appellants' proof. Appellees' proof that they consistently followed a long-established policy of neighborhood schools is merely relevant evidence to be taken into account in deciding whether the forbidden intent did or did not exist. Moreover, proof of such a policy, under all of the facts and circumstances of a case, may be of slight relevancy or none at all.

A neighborhood school policy is not constitutionally suspect. Such a policy does not have constitutional implications one way or the other without a penetrating examination of the complete context in which the neighborhood policy was initially applied and subsequently enforced. Thus, for example, a decision to build a new school in a neighborhood that is entirely white, or entirely Hispanic, is not simply an enforcement of a neighborhood school policy. Location of the school, itself, affects the neighborhood. As the Supreme Court observed in *Keyes v. School District No. 1, supra,* 413 U.S. at 201-02, 93 S.Ct. at 2694: "[T]he practice of building a school . . . to a certain size and in a certain location, 'with conscious knowledge that it would be a segre-

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[1]Because both sides presented evidence directed to the segregative intent issue, the district court was not faced with the question whether appellants' evidence made out a prima facie case of segregative intent. *Contrast Keyes v. School District No. 1, supra,* 413 U.S. at 209, 93 S.Ct. 2686; *Soria v. Oxnard School District Board of Trustees* (9th Cir. 1973) 488 F.2d 579. For the same reason, we have no occasion to reach the question whether appellants' evidence placed upon the appellees the burden of justifying their conduct and whether failure to do so would require judgment in the appellants' favor. *See, e.g., Dayton Board of Education v. Brinkman, supra,* ___ U.S. ___, 99 S.Ct. 2971; *Columbus Board of Education v. Penick, supra,* ___ U.S. at ___, 99 S.Ct. 2941; *Keyes v. School District No. 1, supra,* 413 U.S. at 209, 93 S.Ct. 2686.

gated school,' . . . has a substantial reciprocal effect on the racial composition of other nearby schools. So also, the use of mobile classrooms, the drafting of student transfer policies, the transportation of students, and the assignment of faculty and staff, on racially identifiable bases, have the clear effect of earmarking schools according to their racial composition, and this, in turn, together with the elements of student assignment and school construction, may have a profound reciprocal effect on the racial composition of residential neighborhoods within a metropolitan area, thereby causing further racial concentration within the schools."

In short, discriminatory intent may motivate the building of a school in a particular location, and that intent is not dispelled by proof that all students in a district were required to attend neighborhood schools.

School closures may be fully justified by many factors which are untainted by forbidden motivations. But school closures cannot be justified by neighborhood school policies. The obvious effect of a closure is to remove a neighborhood school. Similarly, the building of a new school may be undertaken for many reasons that have no racial overtones, but new school construction is not a function of a neighborhood school policy, although it obviously affects attendance patterns in the neighborhood in which the school is located and it may also have a reciprocal effect upon attendance patterns in other schools within the district. As the Supreme Court observed in *Swann v. Charlotte-Mecklenburg Board of Education* (1971) 402 U.S. 1, 20-21, 91 S.Ct. 1267, 1278, 1279, 28 L.Ed.2d 554:

> "The construction of new schools and the closing of old ones are two of the most important functions of local school authorities and also two of the most complex. They must decide questions of location and capacity in light of population growth, finances, land values, site availability, through an almost endless list of factors to

be considered. The result of this will be a decision which, when combined with one technique or another of student assignment, will determine the racial composition of the student body in each school in the system. Over the long run, the consequences of the choices will be far reaching. People gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of innercity neighborhoods.

"In the past, choices in this respect have been used as a potent weapon for creating or maintaining a state-segregated school system. In addition to the classic pattern of building schools specifically intended for Negro or white students, school authorities have sometimes, since *Brown*, closed schools which appeared likely to become racially mixed through changes in neighborhood residential patterns. This was sometimes accompanied by building new schools in the areas of white suburban expansion farthest from Negro population centers in order to maintain the separation of the races with a minimum departure from the formal principles of 'neighborhood zoning.' . . .

"In ascertaining the existence of legally imposed school segregation, the existence of a pattern of school construction and abandonment is thus a factor of great weight."

Strict adherence to a neighborhood policy is no more than circumstantial evidence that bears upon the existence or nonexistence of segregative intent. The existence of such a policy is not enough to prove the absence of segregative intent. We remand the case to the district court for reconsideration in the light of *Columbus Board of Educa-*

tion v. Penick, supra, Dayton Board of Education v. Brinkman, supra, and the views herein expressed.[2]

The judgment is vacated and the cause is remanded to the district court for further proceedings consistent with the views herein expressed.

RUSSELL E. SMITH, District Judge (dissenting):

I respectfully dissent.

In a painstaking opinion (*Diaz v. San Jose Unified School District,* 412 F.Supp. 310 (N.D.Cal.1976)) the district judge discussed, under subheads A-J inclusive, all of the facts on which appellant relied to establish an intent to segregate. The district judge then made two express findings: first, "The court finds that the district has consistently adhered to a neighborhood school policy"; and second, "The board has applied this policy neutrally." 412 F.Supp. at 334. The district judge then made the ultimate finding of fact: "The court finds that defendants, who consistently adhered to a neighborhood school policy, have never acted with segregative intent." 412 F.Supp. at 335. I do not think that the judge did find, or that he could have found, that the Board applied the policy neutrally without considering all of the evidence so carefully detailed by him. In short, I think the district court did what the remand tells him to do.

I would affirm.

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[2]We do not wish to be understood as indicating any opinion on the relative weight of any or all of the evidence that has been submitted; rather, our decision is confined to the determination of law that conclusive or dispositive effect cannot be given to a consistently followed, facially neutral, neighborhood school policy.

Appendix F

Arnulfo M. DIAZ et al., Plaintiffs,

v.

SAN JOSE UNIFIED SCHOOL DISTRICT, et al.
Defendants.

No. C-71-2130 RFP.

United States District Court,
N. D. California.

Jan. 1, 1976.

OPINION

PECKHAM, District Judge.

I. PROCEDURAL HISTORY

Plaintiffs, parents of Spanish-surnamed American children attending public school in the San Jose Unified School District, bring this action on behalf of themselves and all others similarly situated. They charge that defendants, the San Jose Unified School District, its Superintendent, and members of its Board of Education, have purposefully operated and maintained a segregated public school system in violation of the Fourteenth Amendment. Defendants admit the existing racial imbalance in the school system, but argue that ethnic imbalance results not from defendants' intentional conduct but from demographic and residential patterns over which they have no control. Jurisdiction is vested in this court by 28 U.S.C. §§ 1343 (3), 1343(4) and 42 U.S.C. § 1983.

On November 4, 1971, plaintiffs instituted this action and sought a temporary restraining order and a preliminary injunction to restrain defendants from completing construc-

tion of the following schools until the court could determine the merits of this case:

College Park Elementary
Anne Darling Elementary
Gardner Elementary
Hester Elementary
Jefferson Elementary
Lincoln Glen Elementary[1]
Longfellow-Edison
(combined elementary/continuation)[2]
Lowell Elementary
Mann Elementary
Olinder Elementary
Washington Elementary
Roosevelt Junior High
Wilson Junior High

On November 4, this court denied plaintiffs' ex parte application for a temporary restraining order and issued an order to show cause. After a hearing on November 10, 1971, the court issued a temporary restraining order prohibiting construction of almost all[3] of the schools slated for reconstruction pending a hearing on plaintiffs' motion for preliminary injunction.

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[1]Lincoln Glen was not mentioned in the body of the complaint, but was included in the prayer and in the Application for Temporary Restraining Order and the Order to Show Cause.

[2]Longfellow and Edison operated on the same campus, which is no longer the case. Plaintiffs have not pressed their Edison claim, Edison serving the entire school district as a continuation/opportunity school.

[3]Because construction bids had already been received on Hester and Lowell elementary schools, this court found that the school district would suffer substantial harm if rebuilding of them were halted. College Park was inadvertently omitted from the Temporary Restraining Order.

After extensive oral argument on December 17, 1971, this court denied plaintiffs' motion for a preliminary injunction. In the opinion dated January 12, 1972, the court concluded that on the record presently available:

> . . . [t]his Court does not believe that such [ethnic] imbalance alone constitutes a violation of plaintiffs' civil rights. As the Sixth Circuit recently pointed out in *Davis v. School District of City of Pontiac, Inc.*, 443 F.2d 573 (6th Cir.), *cert. denied*, 40 U.S.L.W. 3192 [404 U.S. 913, 92 S.Ct. 233, 30 L.Ed.2d 186] (1971), 'a school district has no affirmative obligation to achieve a balance of the races in the schools when the existing imbalance is not attributable to school policies or practices and is the result of housing patterns and other forces over which the school administration had no control.' 443 F.2d at 575.
>
> Plaintiffs cannot hope to succeed on the merits, then, unless they can demonstrate how the defendant School District has acted to create ethnic imbalance in the San Jose schools. After examining the evidence plaintiffs have offered in support of a preliminary injunction this Court can find no instances where defendant School District has acted impermissibly. The evidence shows that defendant School District has adhered to a 'neighborhood school policy,' with the result that ethnic composition of the schools merely reflects residential patterns. This is not a case like *Spangler v. Pasadena City Bd. of Education*, 311 F.Supp. 501 (D.Colo. 1970); *Keyes v. School District Number 1, Denver, Colo.*, 313 F.Supp. 61 (D.Colo.1970), *aff'd in part, rev'd in part*, 445 F.2d 990 (10th Cir. 1971); or *Davis v. School District of City of Pontiac, Inc., supra*, where the defendant school districts claimed to be following a neighborhood school policy, but conveniently refrained from strict adherence to that policy when it appeared to be leading to increased integration.

Accordingly, the Court finds that given the evidence available at this stage in the litigation, there is an insufficient likelihood that plaintiffs will prevail on the merits to warrant the issuance of a preliminary injunction; and plaintiffs' motion is hereby DENIED.

Trial on the merits was held on July 16, 18-19, 23-25 and August 6, 8-9, 16 and 20, 1974. A transcript was prepared and the parties were ordered to submit proposed findings of fact and conclusions of law. The court heard oral argument on April 30, May 1 and May 13, 1975.

II. THE PARTIES

Plaintiffs in this action are Arnulfo M. Diaz and Socorro Diaz, as parents and next friends of Fernando Diaz, Miguel A. Diaz and Juan F. Diaz; Jose Vasquez, as parent and next friend of David Vasquez, Susan Vasquez and Jody-Lynn Vasquez.

When this action was filed in November, 1971, each of the six named minor plaintiffs attended either junior high school or high school within defendant San Jose Unified School District. By 1973, when the trial commenced, two of the student plaintiffs attended either junior high school, high school, or continuation schools, and both were expected to enroll and continue in San Jose high schools for the school year 1974-1975.

Defendants are the San Jose Unified School District ("school district"), a political subdivision and school district of the State of California; Charles Knight, individually and as District Superintendent of the San Jose Unified School District; Neil H. Geier, Jr.; Elizabeth J. Allen; Edwin P. Jones, Jr.; Mary K. McCreath; and Donald L. Raimondi, individually and as members of the Board of Education of the San Jose Unified School District ("board") as of November, 1971, when this action commenced. During the pendency of this action, Phillip L.

Hammer replaced Edwin P. Jones, Jr. as a board member, effective July 1, 1973, and having appeared as a party herein through counsel of record is hereby substituted as a party in place of Mr. Jones.

This is a class action brought pursuant to Rule 23, Federal Rules of Civil Procedure, the class consisting of all Spanish-surnamed students enrolled in the San Jose Unified School District and their parents. Spanish-surnamed Americans are the only substantial minority group in the district.

III. GENERAL BACKGROUND

San Jose Unified School District is a political subdivision of the State of California operated by and pursuant to state law. General direction and control of the district is vested in the Board of Education comprised of five members who are elected to four-year terms. The Chief Executive Officer of the school district is the Superintendent of Schools.

From 1963 through 1974, the following persons held positions as Superintendent and board members of the district:

Superintendent		Board Members			
1963 Crandall	Jones	Gunderson	Gale	Butcher	Douglass
1964 Crandall	Jones	Gunderson	Gale	Butcher	Geier (8/6/64)
1965 Crandall	Jones	Gunderson	Gale	Butcher	Geier
1966 Downing (7/1/66)	Jones	Gunderson	McCreath	Butcher	Geier
1967 Downing	Jones	Gunderson	McCreath	Butcher	Geier
1968 Downing	Jones	Gunderson	McCreath	Butcher	Geier
1969 Downing	Jones	Hopkins (5/1/69)	McCreath	Raimondi (7/1/69)	Geier
1970 Knight (7/1/70)	Jones	Hopkins	McCreath	Raimondi	Geier
1971 Knight	Jones	Allen (7/1/71)	McCreath	Raimondi	Geier
1972 Knight	Jones	Allen	McCreath	Raimondi	Geier
1973 Knight	Hammer (7/1/73)	Allen	McCreath	Raimondi	Geier
1974 Knight	Hammer	Allen	McCreath	Raimondi	Geier

The district is situated in Santa Clara County, with the northerly terminus being located approximately at the intersections of Highway 17 and Highway 101 (Bayshore Freeway) in the City of San Jose, California. It extends south in a banana-like shape through central San Jose, approximately 16[4] air miles to a point beyond the Almaden Valley area. The width of the district varies along its length from four air miles maximum to one and one-half air miles minimum across in an east-west direction, the narrowest portion being located approximately at the southern boundaries of Broadway and Washington Elementary Schools. The driving distance of the district totals almost 20 miles. The extreme north and south schools, Bachrodt and Hacienda, while only 12.2 air miles apart, are separated by 17 miles' driving distance along the major north-south transportation route which winds through central San Jose.

The northern one-half of the district is composed of residential neighborhoods, the San Jose Municipal Airport, a Civic Center and central San Jose. The makeup of the area has been altered by urban renewal, freeway construction and acquisition, extension of industrial, commercial and office facilities, and expansion of the airport. The southern half of the district is primarily a suburban area which developed from the late 1950's throughout the 1960's.

Since World War II, ethnic minorities have been increasingly concentrated in San Jose's northern downtown area. While the total population in the downtown area increased only slightly between 1950 and 1960, the minority population more than tripled.

In 1950, the school district consisted of a total of 24 schools: 16 elementary schools, 5 junior high schools, and 3 high schools. The northern boundaries of the district were extended by the 1956 annexation of the Sunol School Dis-

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[4]This ignores a narrow corridor extending north to the bay in which there is no resident population.

trict. The southern boundaries were extended by the 1956 annexation of the Almaden Elementary School District. Since 1956, when Sunol and Almaden were annexed, the external boundaries of the district have not changed.

Between 1950 and 1970, the student enrollment in the district increased by over 250%, and the total number of schools doubled to house the increased student population. By the fall of 1973, the district's Board of Trustees operated 43 schools, enrolling 36,687 students. There are presently 31 elementary schools, three 3-year junior high schools, two 2-year junior high schools, three 3-year high schools, two 4-year high schools, and two special schools.

The racial composition of the district student population is as follows:

TABLE 1

Race	Percentage	Total
Anglo	70.8	25,974
Spanish-surnamed	24.6	9,037
Black	1.5	561
Other Minorities	3.0	1,118

A "segregated" or "ethnically imbalanced" school is defined as a school in which the racial or ethnic makeup of the school's student enrollment is substantially out of proportion with the racial and ethnic makeup of the student population as a whole. Under guidelines promulgated by the State of California, a school is imbalanced "if the percentage of pupils of one or more ethnic groups differs by more than 15 percentage points from that in all schools in the district." Calif.Admin.Code § 2011.

Since 1964, the schools of the San Jose Unified School District have been substantially imbalanced. The State Department of Education Bureau of Intergroup Relations advised the district in the fall of 1968 that 41 of its 50 schools were ethnically imbalanced. The trend toward concentration has continued: while the total student enrollment

in the northern downtown schools has declined, the percentage of Spanish-surnamed students has increased.

The Spanish-surnamed population in the district has declined from 29.7% in 1966 to 24.6% in 1973. From this group, 78.8% of the Spanish-surnamed schoolage children reside in the northern downtown area. Reflecting this demographic concentration, the student population of the northern downtown schools is presently 60.5% Spanish-surnamed, while the student population of the southern schools is only .07% Spanish-surnamed.

The district has followed a pattern of selecting sites for school construction according to their projected long-range requirements. For additional capacity to meet peak year enrollments, portable classrooms are attached to permanent structures or tacked together to form independent units.

Student assignment is dictated by a mandatory attendance boundary; the board requires students to attend schools within the designated geographical areas of their residence. This requirement, commonly termed a "neighborhood school policy," fixes boundaries for schools so that they are relatively convenient to the students; the goal of the system is "walking distance" for as many children as enrollment and facility availability permit. Because "walking distance" varies substantially between elementary and secondary pupils, the board uses transportation within attendance areas where mandated by considerations of distance and safety.[5] The only students transported outside attendance areas are those with special needs—e.g., those with physical or mental disability—who attend special schools which serve the entire district.

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[5]"Safety" is determined by the particular traffic hazards, availability of sidewalks, distances to school, and the age and grade level of the students.

IV. FACTS

To prove that defendants have operated a segregated school system in violation of the Fourteenth Amendment, plaintiffs first established that the board was fully aware of the existing racial imbalance in the district, and then attempted to demonstrate that ethnic imbalance resulted from defendants' intentional conduct. To prove segregative intent, plaintiffs introduced evidence of the district's educational policies on (1) site selection and school construction; (2) adoption of a neighborhood school policy with board-designated attendance areas; (3) reconstruction of Field Act schools; (4) school closures and student reassignments; (5) location of portable classrooms and maintenance of double sessions; (6) student transportation; (7) presentation of materials supporting bond elections; (8) response to integration proposals by a citizens' committee; (9) faculty and staff assignments and (10) failure to integrate despite a state statutory duty and a publicly-issued board policy to relieve ethnic imbalance.

A. *District's Knowledge of Racial Imbalance*

The district's board of education has long been aware of the growing concentration of minority residents in the northern downtown area. The board acknowledged the existence of segregated housing patterns in a 1963 resolution. Moreover, the San Jose Planning Department prepared a public report entitled "Housing Report for the Planning Commission," detailing the ethnic residential makeup of the district and projecting racial demographic patterns through 1990. In 1970, the San Jose City Planning Department prepared a "Demographic Report" for a subcommittee of the district's Quality Urban Education Study Team (QUEST), a citizens' committee charged with evaluating integration proposals in the San Jose school system. The board had access to these reports and knew their recommendations and supporting data.

The board has been and is aware that it operates a system of predominantly Spanish-surnamed schools in the northern downtown core and predominantly Anglo schools in the southern suburban area.

As early as 1962, the board acknowledged that segregation was inherently harmful and recognized the need for a comprehensive study of racial and ethnic isolation within the schools. In a resolution dated January 17, 1963, the board recognized the correlation between de facto segregation and social evils affecting community life. Stating that segregation is aggravated by designation of school boundaries, the board promised to initiate a comprehensive study of ethnic segregation in the school system.

In 1964, the district conducted its first ethnic survey of the schools which confirmed the pattern of imbalance in the schools. In 1965, in what was then policy # 5007.1, the board pledged that, in establishing attendance areas, it would attempt to avoid ethnic segregation of students.

Starting in 1966, in compliance with state requirements, the district conducted annual racial and ethnic surveys of its schools, which disclosed in each and every year a continued pattern of racial imbalance.

In 1968, the Santa Clara County Office of Education issued a report entitled "Improving Ethnic Balance and Intergroup Relations" prepared by consultant Edwin T. Rios, which discussed the deleterious effect of ethnic imbalance in the public school system.

The State Department of Education advised the board that in 1968 41 of its 50 schools were racially imbalanced by state standards. By 1973, substantial imbalance remained in the public schools.

On February 10, 1969, the board unanimously voted to reaffirm its commitment to a quality integrated educational program. The board also voted to establish a broad-based

citizens' committee charged with launching a comprehensive study of ethnic imbalance in the school district and evaluating proposals for integrated education. The board authorized the newly-formed committee to work with consulting services from the State Department of Education and other agencies. By this resolution, the board officially created the QUEST committee.

On March 11, 1970, the board issued a policy statement directed to the QUEST committee, reaffirming its commitment to integration:

> To us a commitment to quality integration means equal opportunity for each student in the district to obtain a quality education. To many, the emphasis has been only on "quality education."
>
> In this regard, we are mindful of a recent statement of President Nixon. "'Quality education' is already being interpreted as a code word for a delay of desegregation. We must never let this meaning take hold."
>
> Quality is what education is all about; desegregation is vital to that quality; as we improve the quality of education for all American children, we will help them improve the quality of their own lives in the next generation.
>
> We, too, believe that integration of the schools is a necessary and important component of quality education. Therefore, it is our desire that Quest review all attendance practices including busing, maintenance of neighborhood schools, transfer policies, attendance boundaries, etc., in light of how they add or detract in the accomplishment of our primary objective of a quality integrated education.

However, integration as the "primary objective" is modified later in this same policy statement.

> On the problem as a whole, however, it is our preliminary judgment that as between the broad areas of instructional program on the one hand and achieving racial and ethnic balance on the other for the near term priority should be given to the instructional program. We are motivated in this by the belief that the hoped-for benefits of racial and ethnic balance in the schools will not be achieved unless revisions have been made in the instructional program, the grouping of students and the training of teachers to make the entire school experience more responsive to the needs of all elements of our community. Simply stated, a racially balanced school is not necessarily an integrated one and does not necessarily provide a quality education. For the long term, we feel that priority should be placed on achieving racial and ethnic balance in our schools to the fullest extent possible within our means as it is to us an essential component of quality integrated education.
>
> Finally, we wish to restate our overall philosophy that we are committed to serving the needs of this community. And as in the past, this Board would not voluntarily adopt a program which it had reason to believe the community had not participated in or would not support.

As indicated by the events listed above, the board clearly knew of the established pattern of racial imbalance within the school system for years prior to the filing of this action. Defendants readily concede both the existence of ethnic imbalance and their awareness of the problem. The central issue in this litigation is whether the board intentionally created or maintained ethnic imbalance.

B. *District Actions and Policies*

1. *Site selection and school construction.* Since 1965, the district has constructed nine new schools on newly-

selected sites. As shown by Table 2, all nine opened as imbalanced schools. In selecting sites for school construction in the Spanish-surnamed northern downtown core, the school district allegedly followed the guidelines outlined in the state's "Checklist for Evaluation of Attendance Practices and/or Proposed School Sites"; however, the district failed to consider the state guidelines for school construction in the Anglo suburban area. When it selected sites, the board knew that the newly-constructed schools would be imbalanced from inception.

By 1973, the district had planned or commenced construction of additional schools in the predominantly Anglo southern suburban area. Ethnic residential patterns indicate that these facilities will open as imbalanced schools.

TABLE 2

School	Year Opened	Percentage Spanish-surnamed When Opened	Percentage Spanish-surnamed in 1973
Williams (elementary)	1968	2.2	1.4
Henderson (elementary)	1966	5.4	1.5
Simonds (elementary)	1966	1.7	2.7
Bret Harte (Jr. high)	1966	7.0	3.4
Leland (high)	1967	5.1	3.4
Allen (elementary)	1965	14.6	4.7
Erickson (elementary)	1968	9.4	6.4
Hammer (elementary)	1966	13.7	6.6
Terrell (elementary)	1966	20.8	7.7

2. *Replacement of Field Act schools.* The Field Act was adopted by the California Legislature in 1933 (former California Education Code § 18191), and is presently found in California Education Code §§ 15451 *et seq.* and § 15501 *et seq.* This "emergency" legislation resulted from public concern following the destruction of many schools by the Long Beach earthquake on March 10, 1933. The rules and regulations prescribed under the authority of the Field Act established minimum requirements for the design, construc-

tion and reconstruction of public school buildings "in order to attain the requisite stability to withstand vertical loads and lateral forces (wind or earthquake) . . ." 20 Cal.Admin. Code, § 2.

Under the 1967 Amendments to California Education Code, §§ 15501 *et seq.*, all school districts were required to order an inspection of school facilities on or before January 1, 1970, to evaluate the safety of buildings. The amended statute required a district governing board to commence plans for the repair, reconstruction, or replacement of any building found unsafe *no later* than six months from receipt of the examination report.

After the statutory inspection, structural engineers found that numerous school buildings in the San Jose school district failed to meet the requirements of the Field Act.[6]

Following the Los Angeles earthquake in February, 1971, which, among other casualties, destroyed several school buildings, the board voted to close all unsafe Field Act schools at the end of the 1971 school year. The district ordered the buildings razed, and, pending reconstruction, housed the students in portable structures with double sessions.

On January 21, 1971, the board created a Building Master Plan Task Group ("Task Group") and subsidiary local committees with responsibility for individual high school attendance areas ("Task Forces"). The Task Group's goal was to establish a construction program and launch a "fast-track" building program to house the Field Act students in new facilities by fall of 1972. In formulating recommendations for the district's reconstruction policy, the Task Group studied the proposed reconstruction of Field Act schools on existing sites. The Task Group commenced work

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[6]School buildings constructed under the supervision of the Department of General Services in accordance with approved plans were exempted from this requirement.

on April 14, 1971, and continued with assistance from the Westinghouse Learning Corporation.

Shortly after receipt of the Task Group's report, in May of 1972, the board decided to rebuild most of the downtown Field Act schools on their original sites. The decision reflected the demand of local parents; the board did not consider the impact of reconstruction on existing ethnic imbalance. No legal obligation compelled the board to rebuild the Field Act schools on their original sites. On August 5, 1971, the board resolved to authorize construction of the following facilities in replacement of Field Act schools:

(a) Schools were to be built in the Washington-Gardner area;

(b) Olinder School was to be rebuilt on the existing Roosevelt site;

(c) Anne Darling, Trace, Hester, Willow Glen and Lowell schools were to be built on their existing sites.

The board later authorized the following changes or additions to the basic plan:

(1) Olinder was rebuilt on a "new site";

(2) Mann remained rebuilt as a portable on site; and

(3) Lincoln Glen (new classroom space) was rebuilt.

Local committees of the Task Group were subjected to opposition to reconstruction of the Washington and Gardner Elementary schools and Wilson Junior High School; however, members of the Spanish-surnamed community pressured for rebuilding of these facilities. Subsequently, over objection of board member McCreath—who voiced a concern that rebuilding of Wilson Junior High might constitute an act of de jure segregation—the board approved reconstruction of Gardner and Washington elementary schools and of Wilson Junior High School, with a restructured grade level. (Wilson was ultimately not rebuilt. See discussion, *infra.*)

The board's election to rebuild most Field Act schools on their original sites resulted in the following pattern of ethnic imbalance in the student population:

TABLE 3

Rebuilt Field Act Schools

School	1971 Percentage Spanish-surnamed	1973 Percentage Spanish-surnamed
Washington	78.4	86.6
Gardner	87.8	86.5
Grant	71.7	78.9
Olinder (traded with city for land)	73.8	76.2
Anne Darling	73.4	67.4
Burnett	65.2	66.6
Hester	43.6	59.2
Lowell	49.5	58.4
Horace Mann	50.2	56.0
Trace	18.3	24.0
Willow Glen	16.8	16.3
Almaden (site moved from commercial area)	6.3	6.5

Trace and Willow Glen were the only two schools that were balanced in 1971 and the only two that were balanced in 1973. Ten of the reconstructed schools were imbalanced in 1971 and remained imbalanced in 1973.

Only two of the Field Act schools, Olinder and Almaden, were rebuilt on different sites. The relocation failed to relieve imbalance; both schools were imbalanced in 1971 and remained so in 1973. In neither school were attendance areas or boundaries altered.

In 1971, the student population at Washington Elementary School was 78.4% Spanish-surnamed and the student population at Gardner was 87.8% Spanish-surnamed. The two schools, with the district's greatest Spanish-surnamed concentration in 1971, remained the district's most imbalanced schools in 1973. When the board directed the schools closed under the Field Act, the board established portable

classrooms at the original sites and maintained the existing boundaries. Recognizing that Washington and Gardner would remain imbalanced schools, the board voted over member McCreath's opposition to rebuild the facilities on their original sites:

Q. What was your opposition, Mrs. McCreath?

A. The Washington-Gardner-Wilson area is a pocket area, it's pretty well self-contained, it's cut off by a freeway and it has traditionally been an area that is very much in imbalance, about as imbalanced as any in our district.

Q. By that you mean segregated?

A. Yes, segregated. And I felt that that is one area in our school system that is close to Willow Glen, the transportation would not be difficult, and I felt that we should begin integrating in that area.

Q. In other words, the students could attend Willow Glen easily?

A. Yes. However, community pressure was brougth to bear to maintain schools, replace the schools.

Q. On their original sites?

A. On their original sites.

By 1973, Washington—constructed entirely from portable classrooms—serviced 797 students, of whom 86.6% were Spanish-surnamed. Because of the crowding, Washington students attended double sessions.

In electing to rebuild Washington and Gardner, the board rejected a Westinghouse Study proposal recommending that Washington and Gardner students be dispersed to contiguous schools. Dr. Knight testified that adoption of the Westinghouse Study proposal would have increased ethnic balance among the area's schools. There existed several alternative methods for student reassignment which would have reduced imbalance. One mile from Washington, the Riverglen School housed 382 students on a 7.6 acre site.

With an enrollment of 19.2% Spanish-surnamed students, Riverglen was 67.4% less concentrated than Washington. Despite the fact that Riverglen was operating under capacity, no Washington students were transferred. Students from the Little Orchard neighborhood, which is almost 100% Spanish-surnamed, were assigned for years to Washington, even though they actually lived closer to Riverglen. Although the board considered plans to change boundaries for several years, it maintained the existing lines in the face of opposition from Riverglen parents.

Canoas, situated approximately three or four miles from Gardner, was housing 218 students—only 9.7% of whom were Spanish-surnamed—on a 7.25 acre site. With no portables, Canoas was operating under capacity. At no time did the board consider transferring Gardner students to Canoas to alleviate imbalance. Lincoln Glen, located on a 6.4 acre site one mile from Washington and two miles from Gardner, housed 326 students, of whom 15% were Spanish-surnamed. Although Lincoln Glen was operating under capacity, the board never considered transferring students to Lincoln Glen to relieve imbalance at Washington or Gardner.

3. *School closures.* Four of the Field Act schools were not rebuilt: Jefferson, Longfellow, Wilson and Roosevelt. Three downtown non-Field Act schools were also closed: College Park, Belden and Bascom. Reassignment of students from the closed schools generally resulted in newly-constituted student enrollments with better ethnic balance than the existing racial concentration at the original schools. In each case, the Spanish-surnamed population increased at the receiving school.

Effective September, 1972, the district consolidated the Longfellow and Hester attendance areas, thereby eliminating Longfellow, which had a 90.4% Spanish-surnamed enrollment in 1971; the consolidated student body resulted in

a 60.7% Spanish-surnamed concentration at Hester. A school-by-school comparison of possible combinations of Longfellow with adjacent elementary attendance boundaries (using 1971 figures) indicates that combination with Hester resulted in the best ethnic balance at the receiving school:

	Enrollment	Spanish-surnamed Enrollment	Spanish-surnamed Percentage
Longfellow:	136	123	90.4
1. Hester	419	186	44.3
	555	309	55.7 (best)
2. Bascom	174	73	39.9
	310	196	63.2
3. Jefferson	339	247	72.9
	475	370	77.9
4. Mann	451	240	53.2
	587	363	61.8
5. Washington	828	644	77.8
	964	767	79.6

Effective September, 1972, the district combined the attendance areas of Bascom and Trace.[7] The Spanish-surnamed student enrollment, which had totalled 39.9% at Bascom, dropped to 24% in 1972 at Trace. A comparison of the possible combinations of Bascom with adjacent elementary district boundaries indicates that the combination with Trace resulted in the best ethnic balance at the receiving school:

[7]Before Bascom was built, Trace served the Bascom area.

	Enrollment	Spanish-surnamed Enrollment	Spanish-surnamed Percentage
Bascom:	174	73	39.9
1. Trace	434	81	18.7
	608	154	25.3 (best)
2. Hester	419	186	44.3
	593	259	43.6
3. Gardner	527	462	87.6
	701	535	76.3
4. Broadway	505	204	40.4
	679	277	40.8
5. Longfellow	136	123	90.4
	310	196	63.2

By resolutions dated February 15, 1973, and April 26, 1973, effective Fall of 1973, the board consolidated the attendance areas of College Park, Belden, Jefferson, and Bachrodt, creating a new Bachrodt attendance area.[8] In electing to assign the primarily Spanish-surnamed students to Bachrodt, the board failed to consider bussing students to southern suburban schools and failed to formulate alternative proposals directed toward relieving ethnic imbalance. The board's inquiry was limited to redesignating boundaries within the northern downtown area; boundary alteration within this area would not affect racial concentration.

Art Ryder, a parent and former chairperson of the Magnet School Task Force of QUEST, stated in an appearance before the board on March 15, 1973, that closing College Park and Jefferson afforded an opportunity to implement integration. He urged the board to transfer College Park and Jefferson students not to Bachrodt but to schools south of Willow Glen.

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[8]The Bachrodt area had previously been served by College Park, and Jefferson had at one time served a portion of the Belden attendance area.

The board, however, failed to consider the Ryder proposals or investigate alternative measures directed towards improving ethnic balance. The board decided to keep the students "in generally the same area," rather than relieve imbalance.

A school-by-school analysis of the closed facilities (1972 figures) indicates that consolidation of each school with Bachrodt resulted in a better ethnic balance than possible by combination with any adjacent attendance areas.

	Enrollment	Spanish-surnamed Enrollment	Spanish-surnamed Percentage
College Park:	221	136	61.5
1. Hester	526	311	59.1
	747	447	59.8
2. Jefferson	285	203	71.2
	506	339	67.0
3. Bachrodt	225	67	29.8
	446	203	45.5 (best)
4. Belden	291	175	60.1
	512	311	60.7
Jefferson:	285	203	71.2
1. Hester	526	311	59.1
	811	514	63.4
2. College Park	221	136	61.5
	506	339	67.0
3. Bachrodt	225	67	29.8
	510	270	52.9 (best)
4. Belden	291	175	60.1
	576	378	65.6
5. Grant	644	486	75.5
	929	689	74.2
6. Mann	469	249	53.1
	754	452	59.9

	Enrol'ment	Spanish-surnamed Enrollment	Spanish-surnamed Percentage
Belden:	291	175	60.1
1. Bachrodt	225	67	29.8
	516	242	46.9 (best)
2. Grant	644	486	75.5
	935	661	70.7
3. Jefferson	285	203	71.2
	576	378	65.6

Based on the 1972 student ethnic ratios, the projected Spanish-surnamed percentage of Bachrodt students in 1973 would have increased from 29.8% to 56.6%. This would have represented a 5% decrease for College Park students, a 4% decrease for Belden students and a 15% decrease for Jefferson students; no superior alternative combination was possible within the adjacent attendance areas. The actual (as opposed to projected) percentage of Spanish-surnamed students increased to 61.9%; this resulted from a departure of approximately 180 students—150 of whom were Anglo—from the combined attendance areas.

In 1971, the board closed Roosevelt Junior High School, with 64.8% Spanish-surnamed students, and Wilson Junior High School, with 79.6% Spanish-surnamed students. Both had been three-year schools servicing seventh, eighth and ninth grade students.

After the disputed decision of October 21, 1971, to reconstruct Wilson, the district unsuccessfully attempted to obtain facilities for Wilson in the September 1972 bond election. On December 21, 1972, the Woodrow Wilson Rebuilding Committee reminded the board of its obligation to rebuild Wilson; however, in the 1973 bond issue, the district failed to include funds for a reconstructed Wilson. Following a series of actions initiated by the Superintendent on July 3, 1973, and a series of board discussions on July 12,

July 19, September 16 and September 20, the board decided not to rebuild Wilson. Instead, the board finalized the existing interim allocation of junior high school students among Markham, Burnett and Hoover junior high schools and Lincoln High School.

The two remaining downtown junior high schools, Burnett with 64.9% Spanish-surnamed students and Hoover with 27.8% Spanish-surnamed students, were contracted from three-year (seventh, eighth, and ninth grades) junior high schools to two-year schools (seventh and eighth grade). Correspondingly, two downtown high schools, Lincoln High School, with 43.1% Spanish-surnamed students, and San Jose High School, with 59.6% Spanish-surnamed students, received the ninth grades formerly housed at Burnett and Hoover and became four-year high schools servicing ninth through twelfth grades.

This restructuring resulted in the following attendance pattern. Seventh and eighth grade students, formerly attending Wilson Junior High School, now attended Hoover, Burnett or Markham junior high schools; former Wilson ninth grade students now attended Lincoln High School. Seventh and eighth grade students formerly attending Roosevelt Junior High School now attended Burnett Junior High School; former Roosevelt ninth grade students now attended San Jose High School.

The restructuring resulted in the following ethnic impact on the receiving schools:

TABLE 4

School	Percentage Spanish-surnamed (1970)	Percentage Spanish-surnamed (1973)
Burnett Junior High	64.9	66.9
Hoover Junior High	27.8	42.8
San Jose High	59.6	64.7
Lincoln High	43.1	50.2
Markham Junior High	7.2	18.4

Thus, restructuring aggravated racial imbalance at each receiving school. The most pronounced case was Hoover Junior High School which, formerly one of the district's few ethnically balanced schools, became an imbalanced school. From the vantage point of the transferred students, however, restructured attendance either improved ethnic balance or maintained the previous level. Seventh and eighth grade students at Roosevelt transferred from a school with a 64.8% imbalance to a school with a 66.9% imbalance. Roosevelt ninth grade students transferred from an imbalance of 64.8% to an imbalance of 64.7% at San Jose High School. Seventh and eighth grade students at Wilson Junior High School transferred from a school with a 79.6% imbalance to schools with imbalances of 42.8% (Hoover Junior High School), 66.9% (Burnett Junior High School), and 18.4% (Markham Junior High School). Ninth grade students at Wilson transferred from 79.6% imbalance to 50.2% imbalance at Lincoln High School.

The board failed to formulate or evaluate alternative proposals for student transfers from Roosevelt. The board did not consider transporting Roosevelt students to a less impacted facility than San Jose High School. Nor did the board consider housing Roosevelt Junior School students in portables at Bret Harte Junior High School or John Muir Junior High School in the south, which would have resulted in improved balance. In housing high school students transferred from Roosevelt, the district did add portables to San Jose High School in the northern downtown core.

Before finalizing the restructuring decision, the district considered transferring all Wilson Junior High School students to adjacent Markham Junior High School, with only 7.2% Spanish-surnamed students. Because Markham was conducting double sessions, the proposed transfer was contemplated as a temporary measure pending location of a site in the southernmost portion of the northern down-

town core for a magnet school with a large "integrated student body." However, community opposition developed, and a parents' meeting held at Markham Junior High School indicated mass hostility to bussing students from Wilson to Markham. In the face of this opposition, the board decided to restructure grades and transfer the majority of Wilson students to the northern Hoover, Burnett and Lincoln junior high schools.

By 1973, the junior and senior high schools in the district reflected the following ethnic makeup:

TABLE 5

School	Percentage Spanish-surnamed
Four-Year High Schools	
San Jose (serves northeast)	64.7
Lincoln (serves northwest)	50.2
Three-Year High Schools	
Willow Glen (serves attendance area crossing entire district, south of San Jose and Lincoln attendance areas)	13.6
Pioneer (serves attendance area crossing entire district, south of Willow Glen)	8.1
Leland (serves south)	3.4
Two-Year Junior High Schools	
Burnett (serves northeast)	66.9
Hoover (serves northwest)	42.8
Three-Year Junior High Schools	
Markham (serves attendance area crossing entire district, south of Burnett and Hoover)	18.4
Muir (serves attendance area crossing entire district, south of Markham)	8.6
Bret Harte (serves south)	3.4

4. *Assignment of portables and administration of double sessions.* Portable classrooms are moveable and designed for quick temporary service. The district owns over 400 portable classrooms which are distributed throughout 39 of the district's 42 schools. In addition, the district leased

112 portable classrooms to house students pending reconstruction of Field Act schools.

In assigning portable classrooms, the district has "followed a policy of picking them up and moving them around to schools to accommodate whatever the needs are at that particular school." The district has never used portable location to improve ethnic balance.

The district has used portables to create schools on sites in the imbalanced northern downtown area. In the Fall of 1973, seven downtown schools were totally constructed from portable classrooms. No consideration has been given to transporting northern students to a southern suburban school.

Students in the southern suburban part of the district have been overcrowded in their present facilities. As a temporary measure, until new construction is completed, the southern schools have conducted double sessions. The double-session relief measure did not alter the ethnic make-up of the southern schools, which, with a heavy concentration of Anglo students, are ethnically imbalanced.

In the school year 1973-1974, the two junior high schools located at the southernmost part of the district conducted double sessions. John Muir High School, with a student capacity of 1,554, serviced 2,167 students; Bret Harte Junior High School, with a student capacity of 1,764, serviced 2,220 students. Both southern junior high schools were severely imbalanced: the percentage of Spanish-surnamed students totalled 8.6% at John Muir and 3.4% at Bret Harte. The two northern junior high schools remaining after closure of Roosevelt and Wilson were also imbalanced: the student enrollment at Burnett was 66.9% Spanish-surnamed, while the student population at Hoover was 42.8% Spanish-surnamed. Thus, the district was operating four ethnically imbalanced junior high schools. The fifth, Markham Junior High School, with 18.4% Spanish-sur-

named students, approached racial balance. The district could have relieved congestion in the southern schools and improved ethnic balance in all junior high schools by transporting students from southern facilities to the under-capacity northern schools.

At a school board meeting on May 2, 1974, a group of Anglo parents demanded that their children be relieved of double sessions at Muir and Bret Harte junior high schools. On May 16, the board responded by authorizing inter-district transfers permitting Anglo students to attend schools outside their neighborhood attendance areas for the 1974-1975 and 1975-1976 school years.[9] Executive sessions of the board met with the district superintendent and the board attorney to reevaluate the newly-enacted authorization of inter-district transfers. Counsel for the board advised the district that the court in this litigation might adversely interpret deviation from the board's stated adherence to a neighborhood school policy, in circumstances which relieved crowding while perpetuating ethnic imbalance. On June 20, 1974, after receiving this advice, the board rescinded its transfer resolution. Because the resolution was rescinded two months after passage, no student actually transferred from the district to a neighboring school.

Although district officials agree that double sessions are educationally undesirable, the district has maintained double sessions at Bret Harte and John Muir pending construction of new junior high schools in the southern suburban part of the district. When completed, these schools will almost certainly open as imbalanced schools, since they will serve Anglo attendance areas.

Faced with overcrowding at Pioneer High School, a southern suburban facility with a 5.7% Spanish-surnamed

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[9]No evidence was introduced at trial regarding the comparative distances between the adjacent southern schools and the under-capacity northern facilities.

population, the board transferred students to Leland High School, an adjacent southern facility with a 4.1% Spanish-surnamed population. Increased ethnic balance would have resulted from board action transferring the Pioneer students to San Jose High School, a northeastern facility separated from Pioneer by the bordering Willow Glen attendance area. Although San Jose High School, with a 59.6% Spanish-surnamed student enrollment, was operating undercapacity, the district failed to transport any Pioneer students to San Jose High School.

TABLE 6

Schools on Double Session—1973

School	Grades	Location
Allen	2–3–4	Suburban
Almaden	All elementary grades	Suburban
Erickson	4–5	Suburban
Henderson	2–3	Suburban
Simonds	2–3–4	Suburban
Terrell	1–2	Suburban
Valley-View	All elementary grades	Suburban
Washington	3–4–5–6	Downtown
Harte	7–8–9	Suburban
Muir	7–8–9	Suburban

5. *Transportation.* For years, the board has authorized student transportation in the San Jose Unified School District for nonintegration purposes. In the past five years, bussing has dramatically increased in the district: the number of transported students has doubled from 5,000 in 1969 to 10,000 in 1973; the total cost of student transportation has escalated from $338,339 in 1969 to $853,380 in 1973. Indeed, bussing has become routine and widespread: all but 14 schools in the district currently employ student transportation; in the school year 1973-1974, 10,431 out of 36,000 students were bussed daily.

All bussing has occurred within attendance areas. No student has traveled by bus from his residential attendance area to a school in a contiguous or more distant attendance

area. Thus, bussing has always been used in a manner consistent with a neighborhood school policy.

Faced with the physical and demographic makeup of the district—with a concentration of Anglo students in the southern suburban area and Spanish-surnamed students in the northern downtown core—the board could have relieved ethnic imbalance in the schools only by bussing students among attendance areas. "Two-way bussing," in the judgment of Dr. Knight, the Task Group and the Westinghouse Learning Corporation, is a necessary ingredient in any desegregation plan.

Although aware of the impossibility of desegregation without wide-scale transportation, the board repeatedly declared itself opposed to bussing for integration. As early as 1963, the board, through resolution, assured the community of its opposition to bussing for integration; the board has not deviated from this position.

6. *Bond issue elections.* On February 11, 1969, a bond election was held in the district. The district divided the bond issue into two provisions (although they could have combined them into one package): Proposition A authorized the sale of bonds to finance reconstruction of Field Act schools in the northern downtown area; Proposition B authorized the sale of bonds to finance growth of the school system in the southern suburban area. The voters passed only the bonds for reconstruction of the Field Act schools.

As drafted, the bonds insured the rebuilding of each northern downtown school on site in the same locale. However, the board was under no legal compulsion to rebuild on site in the same general area.

The district scheduled another bond election for February 9, 1971. This proposal included a tax rate increase measure for operating revenues only (Proposition I), and an unrestricted 7% bond issue totaling 15 million dollars

(Proposition II). Proposition II authorized 8.3 million dollars to subsidize growth and 6.7 million dollars to refinance Field Act construction since the low interest rate authorized by the 1969 measure rendered it unusable.

Prior to the 1971 election, the board issued a public statement assuring the voters that "this Board will commit itself to the continuation of the present district philosophy of the neighborhood school and transportation for specific educational and safety reasons." Pro-bond material advised voters that if the bond issue were not passed, children presently attending northern downtown Field Act schools would necessarily be bussed to schools in the southern portion of the district. Although the bond election was held on the day of a major Los Angeles earthquake, which destroyed public hospitals and schools, only the revenue measure passed. Funds for reconstruction of Field Act schools were obtained on April 13, 1971, when the bond market interest rate fell below 5%, enabling the district to sell the bonds authorized by the 1969 election.

The district presented the voters with another growth bond issue on September 19, 1972. Board-authorized bond material for this election promised voters that no bond money would subsidize bussing. Bond literature further threatened that failure of the bond issue would result in year-round schools as well as double sessions throughout the district. The voters rejected the bond issue.

The district attempted again to pass a growth measure on February 27, 1973. The board advised the community that failure of the bond issue would result in double sessions throughout the district and altered attendance boundaries designed to equalize student enrollment. These proposed changes, states the board, "would affect family living patterns of most people in the district." The voters rejected the bond authorization once more.

7. QUEST. By resolution adopted January, 1963, the board called for a comprehensive study of racial and ethnic segregation in the school system. The resolution lay dormant for six years. In December, 1969, in response to an official state notification of racial imbalance in the San Jose schools, the board reactivated the proposed study by creating the Quality Urban Education Study Team (QUEST). The role of this board-appointed citizens' group was limited to investigating imbalance and formulating corrective proposals; ultimate approval and implementation authority remained with the board.

Although integration necessarily requires transportation across attendance areas, the board repeatedly discouraged QUEST from including mandatory bussing in any integration proposal. Following several board meetings, the board issued a series of public statements against mass bussing. Faced with public pressure, the board opened the membership of QUEST to all concerned citizens; broad-based representation of the community resulted in a reconstituted, anti-bussing study group. The board ultimately modified its charge to QUEST relegating integration from the "primary objective" of the school district to a "long term ... priority."

In its final majority report, QUEST proposed to eliminate segregation through (1) magnet schools, (2) open enrollment policies, and (3) voluntary bussing. By 1973, the board had adopted neither the QUEST majority proposals nor the minority committee suggestion of educational parks.

8. *Faculty and staff assignment.* The district assigned most Spanish-surnamed teachers to predominantly Spanish-surnamed schools. Of the 1,531 classroom teachers employed by the district in 1973, 89 (5%) were Spanish-surnamed; of these 89 teachers, 54 (over 60%) were assigned to 16 downtown schools. Of the 189 administrators, counselors and resource personnel employed by the dis-

trict in 1973, 20 were Spanish-surnamed; of these 20, 18 (90%) were assigned to northern downtown schools.

Dr. Knight testified that the board had consciously assigned Spanish-surnamed faculty members to northern schools based on perceived educational values. However, the record reflects that Spanish-surnamed teachers served in both northern and southern schools. Plaintiffs' witness, Peter Mesa, agreed with Dr. Knight that there was educational value in exposing Spanish-surnamed children to Spanish-surnamed teachers in the classroom. The highest percentage of Spanish-surnamed faculty at any one time in one school was approximately 26%; another school had a 24% Spanish-surnamed teaching staff; in all other schools, the percentage of Spanish-surnamed faculty remained below 15%. On these statistics, the schools cannot be characterized as identified by segregated faculty.

9. *Neighborhood school policy.* The district has the authority to establish and alter attendance boundaries; it approves all boundary lines. The district policy has been, and is, to require each student in the district to attend the school servicing the residence of the student's parents. The neighborhood school policy is designed for the convenience and safety of the largest number of children; the school attempts to locate schools where it finds the children, so that students live "within walking distance of the school." Dr. Knight defined a neighborhood school attendance area as "an area that would as nearly as possible serve as many children in such a way that as many of them as possible could walk to school."

The neighborhood attendance policy is mandatory. The district has never permitted open enrollment.

Between 1963 and 1973, the district was aware that racial enrollment in each school mirrors the ethnic composition of its surrounding neighborhood when site location and construction practices were coupled with a mandatory

neighborhood school attendance policy. Recognizing the correlation between residence patterns and school enrollment, the board has known that in designating attendance boundaries according to a neighborhood school policy, it has simultaneously created racially imbalanced schools. As board member McCreath testified:

Q. Now, is it true that when you are dealing with an area where the population in that area is predominantly minority, that the so-called neighborhood school policy has the effect of creating segregated schools?

A. Yes.

Q. And has the Board, since the time you have been on the Board been aware of this result of drawing the attendance district boundary lines in accordance with the neighborhood school policy?

A. Yes.

In formulating policies and procedures for facility construction or reconstruction, the district has never deviated from the neighborhood school policy. The district has never changed attendance boundaries or reassigned students to effect integration in this district.

Since 1965, the board has issued and reaffirmed a policy to establish attendance areas which would "avoid the ultimate result of segregation of pupils by ethnic or racial segregation." Dr. Knight testified that in his view the existing attendance boundaries were too rigid and have tended to create ethnic barriers with resulting racial isolation in the school system. Dr. Knight concluded that the district could not feasibly "keep a neighborhood school policy in its pure form and at the same time have integration."

On November 9, 1970, the board in a formal policy statement reaffirmed its commitment to the district philosophy of the neighborhood school.

C. *District's Failure to Desegregate in Violation of Board Policy and State Statutory Requirements*

1. *Board policy.* As early as 1962, the board recognized the need for integration. In a 1963 resolution, the board officially acknowledged the existence of ethnic imbalance in the school system and resolved to undertake a comprehensive study designed to overcome "the evils produced by such school segregation." In 1965, the board pledged to consider segregatory patterns in establishing attendance area boundaries.

Plaintiffs argue that the following board actions violated the board's own stated policy: (1) delay in commencing a meaningful study of segregation; (2) interference with QUEST; (3) failure to adopt and implement QUEST recommendations; (4) adherence to mandatory neighborhood school attendance areas without bussing; (5) site selection and designation of boundaries for new schools; (6) drafting bond material for replacement of Field Act schools; and (7) site selection and attendance area designation for reconstructed Field Act schools. Plaintiffs contend that, while this pattern of conduct alone demonstrates compelling evidence of segregation intent, it provides conclusive evidence of segregative intent when contrasted to the stated board policy and unfulfilled board promises.

2. *State policy.* Title 5 of the California Administrative Code, defining racial and ethnic factors in school attendance practices, was law in California from 1962 to 1972. On October 23, 1962, the State Board of Education first filed administrative guidelines outlining the obligations of school districts in establishing attendance areas. The regulations mandated school boards to consider the ethnic composition of immediate and peripheral areas, to evaluate the impact of proposed boundary designation on ethnic balance, to formulate alternative plans, and to avoid, "as far as practicable" attendance areas which establish or maintain ethnic

segregation. (Article 1.5 of Title 5 of the California Administrative Code, § 2010 filed October 23, 1962, effective 30 days thereafter [Register 62, Number 22].)

Section 2010, added to Title 5 in 1962, did not specifically legislate attendance practices or site selection. However, on February 23, 1963, the State Board amended the 1962 provisions to require school districts to analyze attendance practices, as well as attendance areas in attempting to eliminate segregation. (Cal.Admin.Code Title 5, §§ 2010, 2011, amendment filed Feb. 20, 1963, effective 30 days thereafter [Register 63, No. 3].) These provisions were not amended until 1969.

By amendments filed February 21, 1969, effective 30 days thereafter, the State Board of Education:

(a) expanded coverage to include school sites, as well as school attendance areas and school attendance practices;

(b) changed the word "segregation" to the word "imbalance";

(c) assigned "high priority" to the prevention and elimination of imbalance in all decisions relating to school sites, school attendance areas and school attendance practices;

(d) codified the existing administrative practice requiring school districts to conduct racial/ethnic surveys and compile data recording racial and ethnic makeup of grade levels and individual schools;

(e) defined "imbalance" as a school in which one or more racial or ethnic groups differed by more than 15 percentage points from the total percentage of that group within the entire school system; and

(f) required districts to formulate and evaluate corrective plans for imbalanced institutions, assigning high priority to elimination of racial or ethnic imbalance, and analyzing "feasibility factors," including existing demography, "traditional factors used in site selection, boundary

determination, and school organization by grade level," and "the effect . . . alternatives on the educational program." See Calif.Admin.Code, Title 5, §§ 2010, 2011, amendment filed February 21, 1969, effective 30 days thereafter [Register 69, No. 8]. These sections were renumbered without substantive change to sections 14020 and 14021 respectively by amendment filed January 14, 1970, effective 30 days thereafter [Register 70, No. 3].

On February 11, 1970, a court ordered desegregation of the Los Angeles Unified School District, relying in part on Title 5; one month later, on March 13, 1970, the State Board of Education issued urgency legislation repealing sections 14020 and 14021 of Title 5. [Register 70, No. 11, filed March 13, 1970, effective immediately as an emergency.] However, a Sacramento superior court subsequently determined that there existed no emergency and thus no justification for repeal without advance public notice. Consequently, the State Board of Education reinstated sections 14020 and 14021 on June 25, 1970 [Register 70, No. 26].

In 1971, Assemblyman Bagley introduced AB 724, which became law effective March 4, 1972. This legislation, which codified and revised the administrative guidelines as California Education Code §§ 5002, 5003, amended the Title 5 provisions to:

(1) eliminate the 15% rule and substitute "significant" difference from the district wide percentage as the governing standard for imbalance;

(2) require affirmative plans and implementation schedules to eliminate imbalance and vest approval power in the State Department of Education;

(3) order the State Board of Education to adopt rules and regulations for implementation of code sections. (Calif. Stats. 1971, Ch. 1765.)

On November 7, 1972, the California electorate passed Proposition 21, which repealed the Education Code sections and the Title 5 provisions. On January 15, 1975, the California Supreme Court upheld the voters' authority to repeal Title 5 provisions, noting that the administrative regulations were matters of state policy not required by any constitutional or legal mandate; the Court held that the provisions of Proposition 21 repealing Title 5 were severable from the unconstitutional portions of the referendum, which sought to preclude school districts from making assignments of students required by law.

As memorialized in correspondence and reports between the district and the State Department of Education, B.I.R., the board understood the statutory obligation to conduct studies and formulate alternative plans designed toward reducing ethnic imbalance in the school system. School district staff members presented the board with a report prepared on October 23, 1971, entitled "Preliminary Decisions Regarding Integration." This report set forth a series of proposed decisions suggested for developing concrete policies for integration. The report recommended that planning be placed so that district-wide integration be achieved no later than the 1972-1973 or 1973-1974 school years. The board has never acted on this report.

Although the board has been aware of Title 5 requirements and has realized that adherence to a neighborhood school policy presents an obstacle to desegregation, the board has never directed its staff to formulate alternative criteria for student assignment or to prepare a plan for district-wide integration.

The district represented to the state in its progress reports that mandatory closing of Field Act schools would afford an opportunity to change attendance criteria and achieve progress towards desegregation; implicit in these representations was a suggestion that the board would take

advantage of the opportunity. When the opportunity did arise in 1971, the board elected to rebuild the schools on the existing sites with the existing attendance areas, resulting in "very little change" in ethnic imbalance.

The district further advised the State Department of Education of progress toward integration through the QUEST study of racial imbalance and recommendations for school desegregation. After establishing QUEST, the board limited the scope of its inquiry by eliminating mandatory mass bussing from consideration as an integration measure. The final QUEST report included three proposals: magnet schools, open enrollment, and voluntary bussing. No action was taken on any QUEST proposal.

Under Title 5, school districts were required to consider the impact of site selection on ethnic composition of existing schools in adjacent areas. In selecting sites for new facilities in the Anglo suburban area, the district has not applied the state's checklist for improved ethnic balance.

Although the board knew of the resources available at B.I.R., the district never requested technical assistance in drafting an integration plan. B.I.R. also scheduled special informational seminars for school districts engaged in desegregation litigation; no board member attended.

V. DISCUSSION

In *Keyes v. School District No. 1*, 413 U.S. 189, 93 S.Ct. 2686, 37 L.Ed.2d 548 (1973), the Supreme Court held that the desegregation mandate of *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), is triggered only by a finding of intentional state discriminatory action. Affirming the dichotomy between actionable *de jure* segregation and constitutionally permissible *de facto* imbalance, the Supreme Court stated: "We emphasize that the differentiating factor between *de jure* segregation and so-called *de facto* segregation . . . is *purpose* or *intent* to segregate." 413 U.S. at 208, 93 S.Ct. at 2697. In defining

the quantum of state action necessary to sustain a finding of *de jure* discrimination, *Keyes* sets forth three requirements: (1) the school system must in fact be racially imbalanced; (2) state officials must have created or maintained ethnic imbalance; and (3) in creating or maintaining ethnic imbalance, state officials must have acted with segregative intent.

Analysis of the San Jose Unified School District within this framework establishes that two of these three elements are satisfied. As the State Department of Education has found, as plaintiffs urge, and as defendants readily concede, the San Jose school system is characterized by marked racial imbalance.[10] Moreover, while school officials did not create the imbalance, state action has perpetuated existing ethnic composition: by rebuilding the Field Act schools on site, and by adopting a neighborhood school policy to govern school assignment in a racially segregated community, the school board has maintained the existing imbalance. This litigation focuses therefore on the third element of *Keyes*; the central inquiry of this lawsuit is whether the numerous school board actions detailed above were motivated by segregative intent.

In the wake of *Keyes*, two lines of judicial authority have developed on the definition of segregative intent in school litigation. Several courts have held that a presumption of segregative intent arises once plaintiffs establish that "school authorities have engaged in acts or omissions, the natural, probable and foreseeable consequence of which is to bring about or maintain segregation." *United States v. School District of Omaha*, 521 F.2d 530 (8th Cir. 1975); *Hart v. Community School Board of Education, New York*

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[10]There is no evidence, however, that the schools are imbalanced in any other respect, i.e., that there is an inequitable distribution of any educational resource—trained faculty, recreational or housing facilities, equipment or textbooks—disfavoring students at northern schools.

School District #21, 512 F.2d 37 (2d Cir. 1975); *Oliver v. Michigan State Board of Education,* 508 F.2d 178 (6th Cir. 1974); *Cisneros v. Corpus Christi Independent School District,* 467 F.2d 142 (5th Cir. 1972) (pre-*Keyes*). *See also, Morgan v. Kerrigan,* 509 F.2d 580, 588-589 (1st Cir. 1974), *aff'g,* 379 F.Supp. 410 (D.Mass.1974).

Other courts have reasoned that intent includes the concept of "purpose" within its definition. *Higgins v. Board of Education, City of Grand Rapids,* 508 F.2d 779, 793 (6th Cir. 1974) (there is an apparent conflict between *Higgins* and *Oliver,* both Sixth Circuit cases); *Husbands v. Pennsylvania,* 395 F.Supp. 1107 (E.D.Pa.1975).

Although a pre-*Keyes* opinion contains the language of "foreseeable consequences," the Ninth Circuit's post-*Keyes* decisions have adopted the "purpose" rather than the "foreseeable" standard of unconstitutional segregation. In *Kelly v. Guinn,* 456 F.2d 100 (9th Cir. 1972), decided prior to *Keyes,* the court cautioned that "[w]e do not mean to suggest that we would agree with plaintiff's assumption that the Constitution is not violated by implementation of a 'neighborhood school' policy is a school district having racially segregated residential patterns when the foreseeable result [is] segregation of the races in the district's schools. That question remains open." 456 F.2d at 106 n. 7. Even in the same opinion, however, the court analyzed the "school district's *purpose* in constructing, renovating, and abandoning schools . . ." 456 F.2d at 108 (emphasis added).

After *Keyes,* the Ninth Circuit clarified the appropriate standard for unconstitutional school board action. In *Soria v. Oxnard School District Board of Trustees,* 488 F.2d 579 (9th Cir. 1973), the district court granted summary judgment against the school board on a theory that "the School Board's accountability for its segregated schools resulting as a natural, foreseeable consequence of its acts and omissions remains open for this court's consideration, regard-

less of any discriminatory motives behind such acts." 488 F.2d at 585. The trial court expressly rejected a defense based on lack of discriminatory segregative motivation ruling that "the Board's contention that it had never intentionally or purposefully segregated its school system did not raise a disputed question of material fact for purposes of summary judgment." *Id.* Reversing, the Ninth Circuit, citing *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971), cautioned against "blaming the school district for other factors which may have contributed to some extent to the composition of schools," and held that the school board could not be held liable for racial imbalance in the school system absent a finding of segregative intent. The case was remanded to the district court for proof on the school board's claims that "only legitimate educational interests motivated its actions, and . . . it had [no] intent to create or maintain segregated schools." 488 F.2d at 587.

Following *Soria,* the Ninth Circuit reaffirmed the "purposeful" standard of segregative intent. In *Johnson v. San Francisco Unified School District,* 500 F.2d 349 (9th Cir. 1974), the Ninth Circuit remanded a San Francisco school desegregation case for a finding on segregative intent, stating:

> This court, in *Soria v. Oxnard School District Board of Trustees,* 488 F.2d 579 (9th Cir. 1973), has construed *Keyes* as requiring for any finding of unconstitutional segregation a "determination that the school authorities had *intentionally discriminated against minority students by practicing a deliberate policy of racial segregation.*"

500 F.2d 349, 351 (emphasis added).

Thus, under the Ninth Circuit formulation of the standard for unconstitutional *de jure* segregation, the school board is precluded only from practicing a purposeful policy of racial separation in the school system; the district is

under no affirmative duty to improve racial balance in the schools. However, where the school board claims that actions which perpetuated racial imbalance were motivated by proper educational concerns, it is the function of the trial court to scrutinize closely the school board decision-making process to assure that false or facile justifications do not mask purposeful discrimination. We now examine the policies and actions of the San Jose Unified School District, to determine whether they indicate unconstitutional segregative intent under the Ninth Circuit standard discussed above.

A. Site Selection and School Construction

Plaintiffs stress that of nine new facilities constructed since 1965, all opened as imbalanced schools. The school board constructed all of these facilities in the southern suburban portion of the district to meet the growing suburban student population. In erecting schools where the students were located, the school board followed its neighborhood school policy.

Plaintiffs have provided no evidence that in constructing new southern schools, the school board gerrymandered or otherwise tampered with school attendance boundaries. The record discloses that in selecting sites for southern schools, the board failed to consider the state's checklist for evaluation of attendance areas; however, consideration of the state's ethnic criteria would clearly have been futile, since adherence to a neighborhood school policy in the southern suburban portion of the district would necessarily result in racially imbalanced schools. Thus, the issue raised by site selection, as well as other school board actions, is whether the neighborhood school system is itself constitutional when engrafted on to racially segregated neighborhoods. This question will be discussed below.

B. *Replacement of Field Act Schools*

In rebuilding the Field Act schools, the board adhered to the neighborhood school policy and rebuilt virtually all the schools on their original sites. The two facilities, Olinder and Almaden, which were constructed on different sites, were built within the existing attendance areas.

In electing to reconstruct the northern schools within the original attendance areas, the board passed up opportunities to improve ethnic balance in the school system. For example, alternatives to rebuilding Lincoln Glen and Washington existed which would have ameliorated imbalance. From a policy standpoint, the board's action may be condemned. The court cannot, however, say that in applying the neighborhood school policy and rebuilding the schools within the existing area the board violated the Constitution: to hold that such action constitutes segregative conduct would be to cast on the school board an affirmative duty to improve ethnic balance; this the Ninth Circuit has refused to do. *Soria v. Oxnard School District Board of Trustees, supra; Johnson v. San Francisco Unified School District, supra.*

C. *Closure of Schools*

Plaintiffs argue that discriminatory intent is shown by a series of board actions in closing certain schools, combining attendance areas, and dispersing students to adjacent facilities. As detailed above, these actions include the closures of Longfellow, Bascom, College Park, Belden, Jefferson, Wilson and Roosevelt.

In 1971, the board closed Longfellow Elementary School and combined its attendance area with Hester. A comparison of the racial composition of adjacent attendance areas shows that from the standpoint of minimizing ethnic imbalance, combination with Hester was the best available alternative within the constraints of the neighborhood school policy. Similarly, when the school board closed Bascom Elementary School and assigned its students to Trace, it

selected the best ethnic alternative available under the neighborhood school policy from the adjacent facilities.

In 1973, the district closed College Park, Belden and Jefferson schools and consolidated their attendance areas with Bachrodt. A comparison of adjacent attendance areas shows that in each case Bachrodt was the best choice from an ethnic standpoint.

The closures of Wilson and Roosevelt junior high schools present more complicated fact situations. After Wilson was closed, its attendance area was dispersed among the three adjacent junior high school attendance areas, two to the north and one to the south, and one high school attendance area to the north. In selecting receiving schools, the district followed its neighborhood school policy. In each case, the students from Wilson found themselves at a school where ethnic imbalance was lower after their arrival than it had been at Wilson. Naturally, the number and percentage of Spanish-surnamed students at each of the receiving schools increased; the most imbalanced junior high school was, however, eliminated. Although the changes improved imbalance from the viewpoint of the Wilson students, they aggravated it from the viewpoint of students at receiving schools. On the whole, however, the court finds that the changes did not significantly aggravate imbalance in the district.

The elimination of the Roosevelt school attendance areas and reassignment of students had no significant impact on ethnic imbalance. Moreover, the changes were conformity with a neighborhood school policy; the alternative options available to the board each required deviation from the neighborhood school policy.

D. *Use of Portables and Double Sessions*

In allocating portable classrooms to existing facilities, the school board has used mobile units in accordance with

its neighborhood school policy, to allow students to remain in their residential attendance area.

Plaintiffs stress the fact that the board instituted educationally undesirable double sessions in the southern portion of the district rather than transporting students to the undercapacity northern schools. While one may disagree with this choice, it demonstrates not racial animus but only strict adherence to the neighborhood school policy. The only deviation from the neighborhood school policy was the board's authorization for inter-district transfers from the congested Bret Harte and Muir junior high schools. Since this short-lived resolution was soon rescinded, no student transferred under the proposed plan.

E. *Transportation*

Plaintiffs emphasize that while the district uses extensive student transportation, the board has never implemented—or even considered—bussing for integrative purposes. This evidence shows only that the district has failed to achieve a perfect "walking distance" system. However, all student transportation is within attendance areas; thus, the district's bussing policy is consistent with its neighborhood school policy. The record discloses no evidence that an equal amount of student transportation could have improved racial balance in the school system. This is a far cry from the once-common case where minority students were bussed past an undercapacity Anglo facility to attend a racially isolated school. *Milliken v. Bradley*, 418 U.S. 717, 725, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974).

F. *Bond Issue Elections*

As discussed above, reconstruction of Field Act facilities within existing attendance areas did not violate the Constitution. Thus, the fact that the provisions of the bond issue submitted at the February, 1969, election limited funds to

rebuilding on site cannot constitute a constitutional violation if the reconstruction itself was permissible.

After passage of the 1969 bond election, decline in interest rates rendered the bonds unsalable and necessitated a second bond election for reconstruction of Field Act reconstruction. Pro-bond literature in the 1971 election was factually accurate in its representation that failure to rebuild northern schools would result in northern students transferring to southern schools. Some pro-bond voters may have been motivated by a fear or dislike of Spanish-surnamed students in southern facilities; however, they may also have been motivated by a fear of congestion or a multitude of other considerations. It is difficult to speculate on the voters' reactions to pro-bond literature; at any rate, the bonds did not pass. The court finds that the factually accurate statements of the board do not establish segregative intent.

The repeated assurances during various bond elections that no funds would subsidize bussing may have assured voters who feared forced integration. However, if there was no affirmative constitutional obligation to bus, these pro-bond representations cannot form the basis for a finding of segregative intent.

G. *QUEST*

The record shows that the board was less than supportive of QUEST. However, the board had no affirmative duty to integrate; thus, the failure to adopt or implement an integration plan does not show segregative intent. Nor is purposeful segregation shown by the board's discouraging QUEST from focusing on bussing as a cornerstone to an integration plan; as stated above, extensive bussing would violate—if not destroy—the district's long standing neighborhood school policy.

H. *Faculty and Staff Assignment*

As noted in the presentation of facts, no school in the district can be identified by its segregated faculty. The board did intentionally assign Spanish-surnamed faculty members to predominantly Spanish-surnamed schools; the board also assigned Spanish-surnamed teachers to Anglo schools.

Courts have frequently condemned segregation of faculty. Segregation in the assignment of faculty and staff ". . . [is] among the most important indicia of a segregated system." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 18, 91 S.Ct. 1267, 1277, 28 L.Ed.2d 554 (1971). Discrimination in the assignment of faculty and staff violates the Constitution independently of the segregation of students. *United States v. Montgomery County Bd. of Educ.*, 395 U.S. 225, 89 S.Ct. 1670, 23 L.Ed.2d 263 (1969); *Bradley v. School Bd. of City of Richmond*, 382 U.S. 103, 86 S.Ct. 224, 15 L.Ed. 2d 187 (1965); *Davis v. School District of Pontiac*, 309 F. Supp. 734 (E.D.Mich.1970) *aff'd*, 443 F.2d 573 (6th Cir.), *cert. denied*, 404 U.S. 913, 92 S.Ct. 233, 30 L.Ed.2d 186 (1971). In the context of discrimination against Blacks, assignment of teachers on the basis of skin color is justly condemned since no educational rationale can be advanced to support racial isolation among faculty. In a suit such as this involving discrimination against Spanish-surnamed Americans, the problem is complicated by language differences. Students for whom English is a second language may or may not need teachers who share their primary language. Proper analysis of this problem requires information on the percentage of Spanish-surnamed students who benefit from bilingual teachers and the extent to which only Spanish-surnamed instructors may assist the special problems of bilingual students. Many Spanish-surnamed students are perfectly fluent in English. Moreover, Spanish-surnamed teachers have no monopoly on speaking Spanish. Unfortunately, no party produced evidence on these questions at trial.

Considering that the percentage of minority teachers in any school is small, that Spanish-speaking teachers may benefit Spanish-speaking students, and that Spanish-surnamed teachers have been assigned positions at Anglo schools, the court does not find that district practices violate the Constitution.

The court further finds that assignment of minority teachers in this case does not in any manner contribute to ethnic imbalance of students in the schools. Even if the assignment practices in the district were unconstitutional, the appropriate remedy would relate solely to faculty assignment and not to student attendance policies. If the assignment of students is otherwise constitutional, it should not be disturbed simply because minority teachers have been assigned to those schools which have constitutionally permissible percentages of minority students. *Higgins v. Board of Education of City of Grand Rapids, supra,* at 787.

I. *Failure to Integrate Despite State and Board Integration Policies*

Plaintiffs argue that segregative intent may be found from the fact that the board adopted a public policy favoring integration but then failed to achieve its stated goal. Throughout the time in question, the board adhered to the neighborhood school policy. Complete integration and a neighborhood school policy are incompatible in the San Jose Unified School District.

Plaintiffs' argument is somewhat unfair to a board facing numerous complex decisions. Had the board failed to state that integration was a worthy objective, plaintiffs could not attack it for unfulfilled promises. Defendants should not be hanged by their own rope simply because they recognized the racial imbalance in the school system, but adhered to the neighborhood school policy rather than taking affirmative action to integrate.

Plaintiffs also urge the court to find segregative intent from the defendants' failure to integrate despite an alleged state-imposed duty. It is clear that the district failed to implement integration proposals. However, the record is ambiguous both as to the nature of the duty imposed and the board's response. As shown above, the state integration guidelines did not impose an absolute affirmative obligation to integrate the district; the guidelines were qualified by other educational considerations. Moreover, the state duty was in constant flux: between 1969 and 1972, the guidelines were strengthened, repealed, ordered reinstated, reinstated, modified by legislative action and ultimately repealed by the electorate. Throughout this period, the district worked with the QUEST committee, the Building Master Plan Task Group and state consultants in an attempt to discharge its obligations. The court does not find evidence of segregative intent from the district's failure to integrate during the years the state guidelines were in effect.

J. *Neighborhood School Policy*

The court finds that the district has consistently adhered to a neighborhood school policy. The board has applied this policy neutrally: the record discloses no attempts to gerrymander attendance boundaries or otherwise manipulate attendance areas to lock in minorities or freeze segregated school patterns.

Plaintiffs repeatedly argue that defendants failed to take advantage of alternatives that would have reduced ethnic imbalance. In discussing the facts, the court has noted the rejected alternatives. The court may disagree with the policy of the board in pursuing other educational goals over improved ethnic balance. If, however, neutral adherence to a neighborhood school policy is constitutional, this court has no authority to intervene and order integration.

The critical issue in this litigation is thus whether a school board may apply a neighborhood school policy. Plain-

tiffs cite two cases in support of their argument that a neighborhood school policy is unconstitutional. In *Brewer v. School Board of City of Norfolk, Virginia*, 397 F.2d 37 (4th Cir. 1968), the court held that school assignment by neighborhood school policy was impermissible, where Norfolk had operated a dual school system in the past and, thus, had a duty to remedy the effects of past discrimination. Plaintiffs in *Brewer* also charged that the school board gerrymandered attendance areas for racial purposes. By the time of trial, the school system used attendance zones with several schools in a zone; students had freedom of choice to attend any school within the attendance area. The "geographical zoning plan" had been adopted without redrawing existing boundary lines, which had been used in the past for a modified freedom of choice plan. *Brewer* is distinguishable from the present case in that the case involved a statutory dual school system. In striking down the Norfolk plan, the court did observe that "[a]ssignment of pupils to neighborhood schools is a sound concept, but it cannot be approved if residence in a neighborhood is denied to Negro pupils solely on the ground of color." 397 F.2d at 42.

The second case cited by plaintiffs is *Spangler v. Pasadena City Board of Education*, 311 F.Supp. 501 (D.C.Cal. 1970), in which the district court held that a neighborhood school policy is unconstitutional when it results in imbalanced schools. The court ruled that "[u]nder the Fourteenth Amendment a public school body has an obligation to act affirmatively to promote integration." 311 F.Supp. at 521. This decision, relying in part on *Brewer*, was handed down three years before the Supreme Court spelled out the requirement of segregative intent in *Keyes*. *Spangler* was never reviewed by the Ninth Circuit because the school board acquiesced in the court's order. 427 F.2d 1352 (9th Cir. 1975). In view of these facts, this court is not disposed to follow *Spangler*.

Several cases have approved neutral adherence to a neighborhood school policy. In *Oliver v. Michigan Board of Education, supra,* 508 F.2d 178, 182 (6th Cir. 1974), the Sixth Circuit held that a school board could rebut the presumption of segregative intent by establishing that its conduct was "a consistent and resolute application of racially neutral policies." 508 F.2d at 182. This same court expressly approved adherence to a racially neutral neighborhood school policy even though it resulted in ethnic imbalance in the school system. *Higgins v. Board of Education of City of Grand Rapids, supra,* 508 F.2d 779, 783, 791 (6th Cir. 1974).

The Ninth Circuit has commented on the neighborhood school policy in *Johnson v. San Francisco Unified School District, supra*:

> The Court in *Keyes* specifically reserved the issue of "whether a 'neighborhood school policy' of itself will justify racial or ethnic concentrations in the absence of a finding that school authorities have committed acts constituting *de jure* segregation." 413 U.S. at 212, 93 S.Ct. at 2699.
>
> We understand the reserved question to be whether it is sufficient to show intentional discriminatory action by someone other than the school board resulting in racially divided neighborhoods, to which the school board applies a "neutral" neighborhood school policy. *Cf. Kelly v. Guinn,* 456 F.2d 99, 106 n. 7 (9th Cir. 1972). Engrafting a neighborhood school policy onto such involuntary neighborhoods may be sufficient ratification of the illicit intent of others to preclude the necessity for showing a purpose by the school board itself to segregate.

500 F.2d at 351, n. 1.

This language indicates that a neighborhood school policy is constitutionally suspect only where the neighborhoods which define school attendance areas are themselves products of official state discriminatory action. In the present

case, plaintiffs produced no evidence of state-approved restrictive covenants, discriminatory zoning, or other racially-motivated state action shaping the demographic and ethnic makeup of the San Jose Unified School District. Since the school board applied the neighborhood school policy neutrally, it follows that the record is barren of evidence of state discriminatory action on the part of the school board or any other political entity.

From a policy standpoint, much can be said for the neighborhood school system. In this day of ever-increasing centralization, the average citizen has less and less control over his life. Decisions by distant bureaucrats appear unresponsive to a citizen's wishes. Transporting students to schools far from home only increases the feeling that the parent is powerless to affect school policy, or to participate in the educational process. Neighborhood schools allow parental involvement in the life of the school. Additionally, time and safety considerations both support the use of neighborhood schools, especially for younger children. This court is not attempting to provide the definitive word on education; these comments are simply to indicate that the neighborhood school system is at the least a reasonable approach to education.

VI. CONCLUSION

The court finds that defendants, who consistently adhered to a neighborhood school policy, have never acted with segregative intent. The schools are, therefore, not unconstitutionally segregated; and this court has no authority to order integration. As the Supreme Court stated in *Swann v. Charlotte-Mecklenburg Board of Education, supra*:

> It is important to remember that judicial powers may be exercised only on the basis of a constitutional violation. Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers

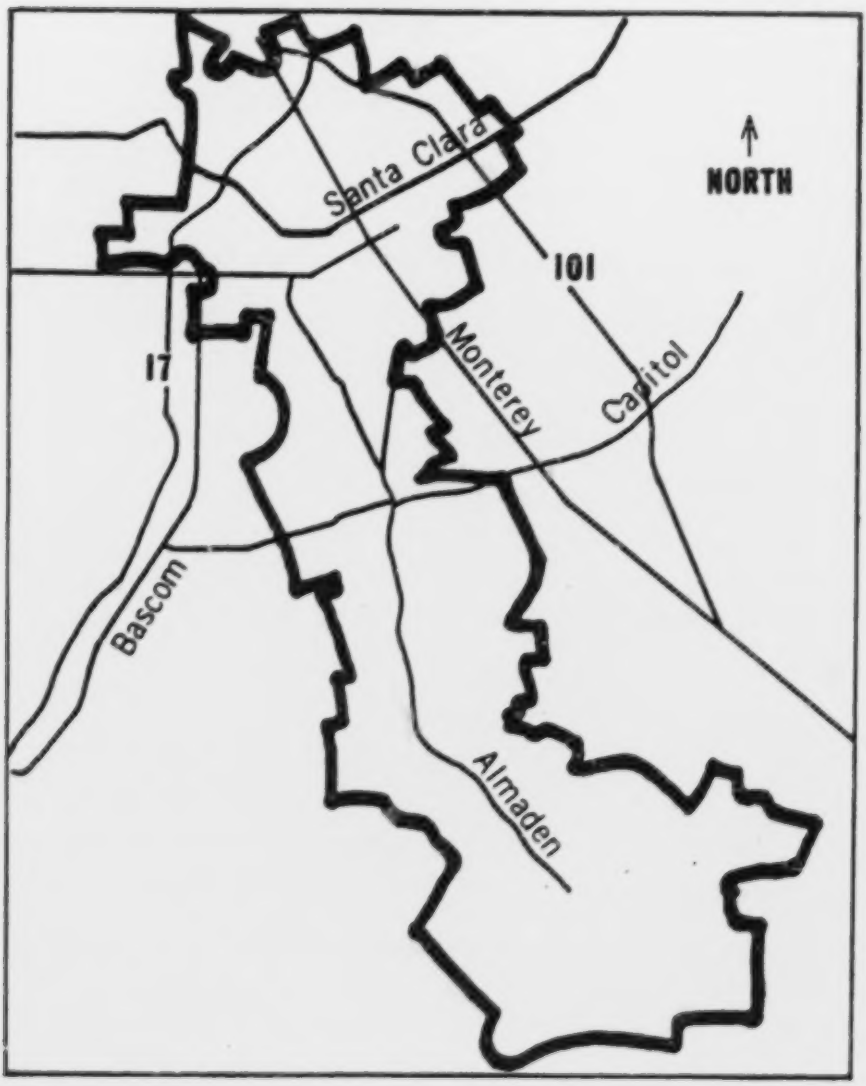
> are plenary. Judicial authority enters only when local authority defaults.

402 U.S. at 16, 91 S.Ct. at 1276.

We do not, however, intend to brand the current allocation of students with a judicial imprimatur, or to discourage the school board from attempting to improve racial balance in the school system. Nothing decided here is intended to inhibit the school board from seeking creative solutions to the problem of ethnic imbalance or to deter the community from supporting such efforts.

This opinion shall constitute the findings of fact and conclusions of law under Rule 52 of the Federal Rules of Civil Procedure.

Appendix G



Appendix H

SUPREME COURT OF THE UNITED STATES
No. A-543

San Jose Unified School District, et al.,
Petitioners,

vs.

Arnulfo M. Diaz and Socorro Diaz, etc., et al.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for petitioner(s),

It is ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 7, 1985.

/s/ William H. Rehnquist

Associate Justice of the
Supreme Court of the
United States

Dated this 16th day of January, 1985.

Office - Supreme Court, U.S.
FILED
APR 4 1985
ALEXANDER L. STEVAS
CLERK

(3)

No. 84-1417

In The

Supreme Court of the United States

October Term, 1984

San Jose Unified School District, Charles Knight, individually and as District Superintendent of the San Jose Unified School District; Neil H. Geier, Jr., Elizabeth J. Allen, Edwin P. Jones, Jr., Mary K. McCreath, and Donald L. Raimondi, individually and as members of the Board of Education of the San Jose Unified School District,

Petitioners,

vs.

Arnulfo M. Diaz and Socorro Diaz, as the parents and next friends of Fernando Diaz, Miguel A. Diaz and Juan F. Diaz; Jose Vasquez, as the parent and next friend of David Vasquez, individually and on behalf of all other persons similarly situated,

Respondents.

On Certiorari to the United States Court of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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31 pp

TABLE OF CONTENTS

Pages

INTRODUCTION 1

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 5

I. The Ninth Circuit's opinions concur on the principle that a neighborhood school policy is not unconstitutional in concept; petitioners' cynical attempt to characterize this case as sounding the death knell of neighborhood schools is disingenuous and misleading. 5

A. The Ninth Circuit considered a neighborhood school policy to be only relevant evidence to be examined in light of all the surrounding circumstances. The opinion has no implications for neutral, evenly-applied neighborhood school policies. 5

B. The Ninth Circuit correctly interpreted this Court's holdings in *Dayton* and *Columbus* as allowing an inference of segregative intent to arise from foreseeable and foreseen segregative effects of official actions. 8

II. Petitioners' exaltation of its neighborhood school policy completely ignores the other aspects of the case, which as a totality, firmly convinced the limited en banc panel of the Ninth Circuit that, viewing the record as a whole, and accepting the district court's underlying factual findings, a mistake had been made. 10

III. The Ninth Circuit's analysis comports with the letter and spirit of Fed. R. Civ. P. 52(a). 14

A. An appellate court is required to examine the facts of a case to determine whether clearly erroneous. 14

TABLE OF CONTENTS—Continued

Pages

B. The Ninth Circuit's opinion shows that it was thoroughly familiar with the record. 15

C. To accept petitioners' argument is to hold that a reviewing court can never examine the correctness of conclusions determined from undisputed underlying facts. 17

D. This case is not appropriate for Supreme Court review since the clearly erroneous standard would not thereby be further explained. 21

IV. This Court's limited resources should not be expended on this case. 22

A. No new legal principles are likely to emerge. 22

B. A review would necessitate reexamination of a voluminous factual record. 24

CONCLUSION 24

TABLE OF AUTHORITIES

CASES:

Brown v. Board of Education, 347 U.S. 483 (1954) 9

Columbus Board of Education c. Penick, 443 U.S. 449 (1979) 3, 8, 9, 20

Dayton Board of Education v. Brinkman, 443 U.S. 526 (1979) 3, 8, 15, 18

Flores v. Pierce, 617 F.2d 1386 (9th Cir., 1980), *cert. denied*, 449 U.S. 875 (1980) 21

Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844 (1982) 18

Morgan v. Kerrigan, 509 F.2d 580 (1st Cir., 1974), *cert. denied*, 421 U.S. 963 (1975) 11

TABLE OF AUTHORITIES—Continued

Pages

Pullman-Standard v. Swint, 456 U.S. 273 (1982) 4, 21, 22, 23, 25

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971) 12, 13

United States v. United States Gypsum, 333 U.S. 364 (1948) 15

Village of Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252 (1977) 4, 10, 21

Washington v. Davis, 426 U.S. 229 (1976) 21

UNITED STATES CONSTITUTION:

U.S. Const. amend XIV, §1 1

STATUTES:

28 U.S.C. §1343(3), 1343(4) 2

42 U.S.C. §1983 1

FEDERAL RULES OF CIVIL PROCEDURE:

Fed. R. Civ. P. 52(a) 14, 15, 17, 22, 23

INTRODUCTION

In their petition to this Court for a writ of certiorari to review the opinion and judgment of the Court of Appeals for the Ninth Circuit, petitioners have concocted arguments unrelated to the actual holdings of the appellate court; in so doing, they have mischaracterized both the opinion and what they deem to be its effect on school desegration jurisprudence. These attempts do not withstand scrutiny.

Respondents submit this brief in opposition, not so much because the Ninth Circuit's opinion needs support—it speaks for itself—but rather to ensure that silence is not deemed acquiescence.

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STATEMENT OF THE CASE

This case is over thirteen years old and has generated five written opinions involving seventeen federal judges. See Pet. App.

On November 4, 1971, this lawsuit was instituted in the United States District Court for the Northern District of California on behalf of all Spanish-surnamed students enrolled in the San Jose Unified School District and their parents, alleging that petitioners, the San Jose Unified School District ("District"), its Superintendent, and members of its Board of Education ("Board") were operating a segregated public school system in violation of the Equal Protection Clause of the Fourteenth Amendment (U.S. Const. amend XIV, §1) and 42 U.S.C. §1983 (1982).

Jurisdiction in the district court was asserted via 28 U.S.C. §§1343(3) and 1343(4) (1982).

At the time the complaint was filed, respondents sought a temporary restraining order to prevent construction of certain schools. *Diaz* I, Pet. App. F, A-111. On November 11, 1971, an order issued prohibiting construction of all but two of the schools pending a hearing on a preliminary injunction. *Id.* Respondents' motion for a preliminary injunction was denied in January, 1972. *Diaz* I, Pet. App. F, A-112. In its opinion denying the injunction, the district court expressly refused to sanction the ethnic imbalance found to exist within the District and expressed the hope that the order would not discourage any efforts to alleviate the imbalance. Notwithstanding the district court's admonition, and in disregard of the recommendations of a task group established to deal with the rebuilding issue which the district court found would have reduced the imbalance, the Board decided to rebuild most of the "Field Act" schools on their original sites. *Diaz* V, Pet. App. A, A-15-16, citing *Diaz* I, [Pet. App. F, A-152]. Trial took place in July and August, 1974, and final argument was heard in April and May, 1975. The district court entered judgment for petitioners. *Diaz* I, Pet. App. F, A-161.

In its opinion, the district court found that the District was markedly imbalanced and that the Board maintained the imbalance by, inter alia, rebuilding the Field Act schools on site and adhering to its "neighborhood school policy." *Diaz* I, Pet. App. F, A-148. Although it also found that the faculty and staff were intentionally assigned schools on the basis of race, *Diaz* I, Pet. App. F,

A-156, the district court concluded the petitioners did not act with segregative intent. *Diaz* I, Pet. App. F, at A-161.

Respondents appealed and oral argument was heard before a three-judge panel of the Ninth Circuit on July 11, 1978. In early 1979, the Court of Appeals vacated submission of the appeal pending the Supreme Court's decisions in two Ohio cases. The Supreme Court's decisions in *Columbus Board of Education v. Penick,* 443 U.S. 449 (1979), and *Dayton Board of Education v. Brinkman,* 443 U.S. 526 (1979), issued on July 2, 1979, and the parties to the instant litigation were ordered to brief the issue of the Ohio cases' impact, if any, on the case at bench. The matter stood submitted on August 13, 1979, and on November 5, 1979, the Ninth Circuit vacated the district court's judgment and remanded the case in light of the Ohio cases and its own opinion. *Diaz* II, Pet. App. E, A-100-109.

The Ninth Circuit noted that inasmuch as both sides had presented evidence on the issue of segregative intent, it was not faced with the issue of whether a prima facie case had been made out. *Diaz* II, Pet. App. E, A-106 n.1. The remand was ordered because of the district court's apparent view that a neighborhood school policy could serve as a complete defense to a charge of discriminatory intent. *Diaz* II, Pet. App. E, A-109. The Ninth Circuit made clear that adherence to a neighborhood school policy is "no more than circumstantial evidence that bears upon the existence or nonexistence of segregative intent." *Diaz* II, Pet. App. E, A-108.

On remand, the district court denied respondents' motion to introduce additional evidence, but ordered rebriefing and oral argument. *Diaz* V, Pet. App. A, A-3. The district court issued its second opinion, again denying relief to respondents. *Diaz* III, Pet. App. D, A-99.

On appeal by respondents, a divided panel of the Ninth Circuit affirmed. *Diaz* IV, Pet. App. C. Respondents again appealed and a limited en banc panel of eleven judges of the Ninth Circuit reversed and remanded. See *Diaz* V, Pet. App. A, A-31. The Ninth Circuit, following *Pullman-Standard v. Swint,* 456 U.S. 273 (1982), stated that its careful review of the record convinced it that the district court's finding (an absence of segregative intent) was clearly erroneous. *Diaz* V, Pet. App. A, A-6. The Ninth Circuit reaffirmed its earlier determination that "adherence to a neighborhood school policy is not by itself dispositive of segregative intent." *Diaz* V, Pet. App. A, A-7. It also made clear that it was not holding that a *de facto* segregated district must abandon its neighborhood school policy, *id.,* rather, it noted that in this case the petitioners' responses to choices related to siting, construction, the use of portables, and others, led invariably to enhanced segregation, and, in light of the requirement grounded in *Village of Arlington Heights v. Metropolitan Housing Corp.,* 429 U.S. 252 (1977), that the totality of the facts and circumstances be investigated, the district court was wrong. *Diaz* V, Pet. App. A, A-9, A-28-31.

The petition for a writ of certiorari followed.

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REASONS FOR DENYING THE WRIT

Petitioners advance three issues to persuade this Court to grant its petition. As will be explained below, the first two, relating to the concept of the neighborhood school policy, should be rejected simply because *the first question has a clear answer and the second is not even an issue presented by this case.* Petitioners' third issue should not result in issuance of the writ because the Ninth Circuit understood and correctly applied the "clearly erroneous" doctrine. Thus this case is of purely local interest and would not serve as a vehicle for explaining any uncertain issues of law. Further, this Court would be forced to review a voluminous factual record that has already been examined by seventeen judges. These, and other, reasons are examined in detail below.

I. The Ninth Circuit's Opinions Concur On The Principle That A Neighborhood School Policy Is Not- Unconstitutional In Concept; Petitioners' Cynical Attempt To Characterize This Case As Sounding The Death Knell Of Neigborhood Schools Is Disingenuous And Misleading.

A. The Ninth Circuit considered a neighborhood school policy to be only relevant evidence to be examined in light of all the surrounding circumstances. The opinion has no implications for neutral, evenly-applied neighborhood school policies.

In both *Diaz* V and its precursor, *Diaz* II, the Ninth Circuit made its view of the relevance of a neighborhood school policy quite clear.

In *Diaz* II, the court recognized that the respondents relied solely on their "consistent adherence to a neighbor-

hood school policy, which was racially neutral." *Diaz* II, Pet. App. E, A-105. This reliance is misplaced, said the court, because "we do not believe that a neighborhood school policy, no matter how consistently followed, can be a determinative fact in proving the ultimate fact of forbidden purpose." *Id.* Indeed, we were told: "Strict adherence to a neighborhood policy is no more than circumstantial evidence that bears upon the existence or nonexistence of segregative intent." *Diaz* II, Pet. App. E, A-108.

Lest there be any confusion that the court was NOT opposed to neighborhood education on constitutional grounds, we were told that a neighborhood school policy is not constitutionally suspect. *Diaz* II, Pet. App. E, A-106.

This language and holding was reaffirmed unmistakably by the Ninth Circuit in *Diaz* V. The court reiterated that adherence to a neighborhood school policy is not dispositive of the intent issue, but merely relevant to that issue. *Diaz* V, Pet. App. A, A-7, citing *Diaz* II.

In light of these statements of law, it is clear the answer to petitioners' first "question presented" is that an inference of segregative intent may be drawn from the existence of a neighborhood school policy, as it has been here. But such an inference need not be drawn—and in an appropriate case an inference of integrative intent might well be required. Which inference, if any, is drawn must depend on all the facts and circumstances surrounding the creation and implementation of the policy.

The Ninth Circuit has never held that an inference of segregative intent arises automatically whenever even a neutral, non-manipulated neighborhood policy has been put into play; petitioners have advanced an issue not pre-

sented by this case. (Of course, the school policy here was anything but neutral.)

Contrary to the contention of petitioners, the Ninth Circuit did not hold that "the import of a neighborhood school policy is simply that students be required 'to attend school within neighborhood attendance areas.'" Pet. at 15, quoting *Diaz* V, Pet. App. A, A-7. The Ninth Circuit understood that petitioners' neighborhood school policy "requires students to attend the school nearest their homes", *Diaz* V, Pet. App. A, A-6, and in its opinions explained that such a policy "'does not have constitutional implications one way or the other without a penetrating examination of the complete context in which the neighborhood policy was initially applied and subsequently enforced.'" *Diaz* V, Pet. App. A, A-7, quoting *Diaz* II, [Pet. App. E, A-106].

Petitioners contend that a "arbitrary and wooden" view of the neighborhood school policy affected the appellate court's findings, Pet. at 15, but the district court itself recognized that "[n]ot only is the selection of sites and the size of schools not dictated by a neighborhood school policy in and of itself, but these decisions can play a crucial role themselves in defining the nature and make-up of a neighborhood." *Diaz* III, Pet. App. D, A-69-70.

The Ninth Circuit found that although the Board was presented with numerous opportunities to ameliorate segregation in the District, most of which would not have threatened the neighborhood school policy, "[t]he Board consistently selected the more segregative alternative." *Diaz* V, Pet. App. A, A-9.

B. The Ninth Circuit correctly interpreted this Court's holdings in Dayton and Columbus as allowing an inference of segregative intent to arise from foreseeable and forseen segregative effects of official actions.

Petitioners' second "question presented" is an even more blatant attempt to infect the Ninth Circuit's opinion with holdings that are not to be found there. This second question asks whether a school district is forbidden as a matter of law from making decisions with foreseeable and foreseen segregative consequences lest it automatically be found to have acted with segregative intent. See Pet. at i.

The Ninth Circuit made quite clear, consistent with this Court's holdings, that the answer is no. The Ninth Circuit explicitly acknowledged that "proof that the segregative effects of a decision were foreseeable is not to be taken, as a general proposition, to make out a *prima facie* case of segregative intent, nor does it routinely shift the burden of persuasion to the defendants." *Diaz* V, Pet. App. A, A-4, citing *Dayton Board of Education v. Brinkman*, 443 U.S. 526, 536 n.9 (1979). Such evidence is merely relevant. *Id.*

Petitioners obviously are attempting to create issues which do not exist in order to interest this Court in reviewing a decision they do not like. Respondents are confident this ploy will not succeed.

Petitioners complain that the Ninth Circuit put misplaced reliance on a passage in *Columbus* "in which this Court was discussing the affirmative duty to remedy the effects of a prior constitutional violation, rather than the

elements of a prima facie case of segregative intent." Pet. at 13. In fact, the discussion concerned findings of segregative intent based upon the Columbus School Board's actions since the 1954 *Brown* I [*v. Board of Education*, 347 U.S. 483 (1954).] decision. *Columbus*, 443 U.S. at 461-464.

Among those actions said in *Columbus* to infer segregative intent were segregative faculty assignments, school site selections with the foreseeable and anticipated effect of maintenance of segregated schools, and the fact that the State Board of Education and community groups had called attention to the problem of segregation and made recommendations which were ignored by the Columbus Board of Education. *Columbus*, 443 U.S. at 462-463, and 463 n.12 (1979).

These acts and omissions may have been given added weight in light of the *Brown* I decision. However, lack of an affirmative duty to desegregate does not render such findings without force in inferring intent to segregate. *See Diaz* III, Pet. App. D, A-60-62.

Moreover, in the case at bench there was a duty under state law to alleviate segregation in schools, no matter what the cause. *Diaz* V, Pet App. A, A-10-12. Even the dissenting members of the Court of Appeals conceded that "[i]naction in the face of an affirmative duty to desegregate may suggest a higher probability of discriminatory intent than does inaction when no such duty exists." *Diaz* V, Pet. App. A, A-33, (Choy, J., *dissenting.*)

The Ninth Circuit recognized that petitioners' knowledge of the segregative effect of their actions was not necessarily determinative of segregative intent. That court

therefore undertook to focus on "the historical background and specific sequence of events leading up to the Board's actions maintaining or exacerbating ethnic imbalance in district schools." *Diaz* V, Pet. App. A, A-5, citing *Arlington Heights*, 429 U.S. at 267-268.

II. Petitioners' Exaltation Of Its Neighborhood School Policy Completey Ignores The Other Aspects Of The Case, Which As A Totality, Firmly Convinced The Limited En Banc Panel Of The Ninth Circuit That, Viewing The Record As A Whole, And Accepting The District Court's Underlying Factual Findings, A Mistake Had Been Made.

Petitioners accuse the Ninth Circuit of adopting a "myopic view of neighborhood education." Pet. at 16. Ironically, it is petitioners who blindly fail to comprehend actions unjustified by the neighborhood school policy which give rise to inferences of segregative intent.

The Ninth Circuit found that not only was the Board award of segregation in the District, but also of the duty under state law to desegregate, no matter what the cause of the segregation. *Diaz* V, Pet. App. A, A-9-10. Because state law held desegregation to be "of overriding educational importance", *Diaz* V, Pet. App. A, A-13, failure to comply with state law cannot be logically justified by invocation of a neighborhood school policy as a defense. Obviously, failure to comply with state law has nothing necessarily to do with the existence or nonexistence of a neighborhood school policy. It has been held elsewhere that the rejection by a school board of desegregation pro-

posals when a state desegregation requirement exists is probative of segregative intent. *Morgan v. Kerrigan*, 509 F.2d 580, 585 (1st Cir., 1974), *cert. denied* 421 U.S. 963 (1975).

However, the Board represented that it was taking steps to comply with state law, while accomplishing nothing. The Board assured the State that the resiting of Field Act schools would be used in such a way as to improve ethnic balance, but the rebuilding maintained the imbalance in the District. *Diaz* V, Pet. App. A, A-22, *Diaz* I, Pet. App. F, A-152. The citizens' committee, QUEST, was appointed by the Board, in response to an official state notification of racial imbalance, with a mandate to study that problem and suggest solutions. *Diaz* I, Pet. App. F, A-140. This group was cited by the Board as indicative of the progress being made toward integration. Although the final report by QUEST included several voluntary programs, none were ever adopted. *Id.* On the whole, the Court of Appeals found that

> [d]espite its recognized duty to take affirmative steps to desegregate, the Board continued to justify actions that maintained segregation by reference to its neighborhood school policy. The Board's stubborn adherence to this policy in the face of clearly established state law holding desegregation to be a matter of overriding educational importance suggests that the Board was motivated, at least in part, by a desire to avoid desegregation rather than a sincere commitment to the educational benefits of neighborhood schools.

Diaz V, Pet. App. A, A-12-13.

The Board made a number of other decisions relevant to the issue of segregative intent. These decisions were either unjustified by, inconsistent with, or completely irrelevant to, a neighborhood school policy.

The District admitted that it intentionally assigned faculty and staff to schools on the basis of race. *Diaz* V, Pet. App. A, A-19. Neither the district court nor the Court of Appeals considered this practice legal. *Diaz* V, Pet. App. A, A-19-20, *Diaz* III, Pet. App. D, A-91-92. Recognizing that "[a] discriminative pattern of assignment of faculty and staff is among the most important indicia of a segregated school system", *Diaz* V, Pet. App. A, A-19, citing *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 18 (1971), the Court of Appeals considered the intentionally segregative practice to be evidence of segregative intent. *Diaz* V, Pet. App. A, A-20.

In 1974 the Board made a blatant, arbitrary departure from its neighborhood school policy. Acceding to the demands of parents of Anglo children at two junior high schools that their children be relieved of double sessions, the Board decided to allow those children to transfer out of their attendance areas. The decision was rescinded on advice of counsel that it may be viewed adversely in that the students could have been transferred to predominately Hispanic schools. The Court of Appeals agreed with counsel's advice and reasoned that the implication of segregative intent was undiminished by the later recission. *Diaz* V, Pet. App. A, A-20-21.

Although double sessions were recognized as being educationally disadvantageous, students in the southern

part of the District were kept in overcrowded schools rather than being transferred to undercapacity schools in the north. *Diaz* V, App. A, A-19. Students at a predominately Hispanic school were kept on double sessions in spite of the availability of room at a predominately Anglo school only one mile away. *Diaz* V, Pet. App. A, A-16-17.

The Board made another notable departure from its neighborhood school policy. Students from the Little Orchard neighborhood, which was nearly all Spanish-surnamed, were forced to attend a school with a predominately Spanish-surnamed population, even though they lived closer to a school which was predominately Anglo. *Diaz* V, Pet. App. A, A-17. The Ninth Circuit found that these departures from the neighborhood school policy reflected the Board's willingness to forego the policy in order to maintain segregation. *Diaz* V, Pet. App. A, A-21.

The downtown junior high schools were restructured from three-year to two-year schools. The restructuring resulted in one feeder system for the predominately Hispanic area, and another for the predominately Anglo area. This transfer also resulted in ethnic imbalance at one of the few balanced schools in the District. *Diaz* V, Pet. App. A, A-15. This restructuring is a classic example of one way in which a "neutral" neighborhood school policy may be used to maintain or exacerbate segregation. *See Diaz* III, Pet. App. D, A-66, citing *Swann*, 402 U.S. at 20-21.

Respondents steadfastly refused to allow busing for integration, although busing within the District was widespread. *Diaz* V, Pet. App. A, A-18. Indeed, seventy-two percent of the schools within the District used buses for

transportation within attendance areas and almost one-third of the students were bussed daily. *Id.*

Particularly telling is the fact that the District refused to follow the QUEST recommendation that voluntary busing be implemented. This board decision cannot be explained with reference to any sort of neighborhood school policy. It is, respondents contend, inexplicable except upon racial grounds, especially when District-commissioned studies showed that busing involving only one-sixth of the District's students would have integrated the District. *Id.*

It was clear to all parties that two-way busing would be a necessary ingredient of any desegregation plan. *Diaz* III, Pet. App. D, A-84-85. The district court found that the respondents' intransigence was "particularly disturbing" when coupled with acts and omissions in other areas relative to the District's imbalance. *Id.* The Ninth Circuit was clearly correct in deciding that "The Board's use of buses for every purpose but integration . . . supports an inference of segregative intent." *Diaz* V, Pet. App. A, A-18.

The foregoing discussion illustrates that there is much more than adherence to a neighborhood school policy involved in this litigation; respondents' announcement of the death of such a policy is highly exaggerated.

III. The Ninth Circuit's Analysis Comports With The Letter And Spirit Of Fed. R. Civ. P. 52(A).

A. An appellate court is required to examine the facts of a case to determine whether clearly erroneous.

Under Fed. R. Civ. P. 52(a) (the Rule, or Rule 52), findings of fact made by a trial judge are to be set aside

by an appellate court only if those findings are found to be clearly erroneous. *United States v. United States Gypsum,* 333 U.S. 364, 395 (1948). This rule is intended to apply to all classes of findings. Fed. R. Civ. P. 52, Notes of Advisory Committee on Rules.

As interpreted by this Court, the entire evidence is to be examined and even if there is evidence to support the findings below, those findings are to be overturned if the reviewing court is left with a definite and firm conviction that a mistake had been made. *United States v. United States Gypsum,* 333 U.S. at 395.

The standard imposed by the Rule does not require that the appellate court be limited as it might be in reviewing the findings of an administrative agency or a jury. *Id.* Petitioners assert that "the Ninth Circuit interpreted Rule 52(a) as imposing no requirement of deference toward trial court findings of fact, and as authorizing revision of such findings whenever an appellate court has the 'firm conviction that a mistake has been committed.'" Pet. at 21, quoting *Diaz* V, Pet. App. A, A-6. It is in *exactly* the latter circumstance that findings of the trial court are to be set aside. This Court has recognized the value of deference to findings of the trial court, but also that "the clearly erroneous standard serves that purpose well." *Dayton,* 443 U.S. at 534, n.8. Not only is an appellate court allowed to set aside findings which are clearly erroneous, *but is has an unavoidable duty to do so. Id.*

B. The Ninth Circuit's opinion shows that it was thoroughly familiar with the record.

The Ninth Circuit made clear its acceptance of the district court's "comprehensive and accurate findings cover-

ing the significant historical facts". *Diaz* V, Pet. App. A, A-6. Respondents have never quarreled with the district court's underlying factual findings. See, e.g., *Diaz* III, Pet. App. D, A-67.

Petitioners now contend, however, that the Ninth Circuit was "unaware" of the record. They assert, for example, that the appellate court "simply overlooked" the trial court's finding that the assignment of faculty and staff was for "benign purposes". Pet. at 23, n. 21. An examination of the opinions of both courts plainly shows that they *agreed* that the racially-based assignments were illegal and the assignment decision was not based on some neutral, non-race related purpose, such as providing Spanish-fluent teachers for Spanish-speaking students. *Compare Diaz* V, Pet. App. A, A-19-20, *with Diaz* III, Pet. App. D, A-91-92.

Indeed, the Ninth Circuit's opinion shows that the court was very well aware of the record. For example, the discussion of QUEST by the Court of Appeals is extremely detailed and utilizes material directly from the record. *Compare Diaz* V, Pet. App. A, A-9-13, A-23-25 *with Diaz* III, Pet. App. D, A-88-91, *and Diaz* I, Pet. App. F, A-140, A-155. The examination of the duty under state law to desegregate also shows careful attention to the record by the Court of Appeals. *Compare Diaz* V, Pet. App. A, A-9-13, with *Diaz* III, Pet. App. D, A-93-95, and *Diaz* I, Pet. App. F, A-143-145. Petitioners' bald assertion that the Ninth Circuit "repeatedly leapt to conclusions that were either unjustifiable in light of all the evidence, or that were actually negated by specific findings of the District Court", Pet. at 22, is completely unsupported by the opinions of the courts below.

The argument is made by petitioners that the Ninth Circuit *must* have ignored the trial court's conclusion that school siting for the Field Act schools was done on the basis of the neighborhood school policy. Pet. at 23. To the contrary; the Ninth Circuit addressed this clearly erroneous conclusion of the trial court at *Diaz* V, Pet. App. A, A-21, and noted that "[n]one of these decisions was required by the neighborhood school policy." *Id.*

However, the petition fails to mention a number of relevant facts regarding the siting of schools. The district court itself felt that the decisions concerning the rebuilding of the Field Act schools presented "[p]erhaps the most disturbing evidence facing the court." *Diaz* III, Pet. App. D, A-71.

The decision was made to rebuild three schools on their old sites despite recommendations to do otherwise from a Board member and consultants hired to advise on improving racial imbalance. *Diaz* III, Pet. App. D, A-71-72, *Diaz* V, Pet. App. A, A-17.

Further, the Board assured the State that the rebuilding of schools would be used to reduce ethnic imbalance. *Diaz* V, Pet. App. A, A-17-18. Although the Spanish-surnamed community wanted three of the schools rebuilt on the same sites, there was also opposition to the reconstruction of these schools. *Diaz* I, Pet. App. F, A-124.

Here again, an examination of the Ninth Circuit's opinion shows it was well aware of the record in this case.

C. To accept petitioners' argument is to hold that a reviewing court can never examine the correctness of conclusions determined from undisputed underlying facts.

As discussed above, the Ninth Circuit was obviously aware of the constraints imposed by Rule 52(a). The rule

was cited, and the clearly erroneous standard quoted early in the opinion. *Diaz* V, Pet. App. A, A-5-6.

Petitioners note correctly that Rule 52(a) requires appellate courts to defer to the findings of trial courts. However, this duty of deference is not in addition to the clearly erroneous standard, but is part and parcel of that standard. *See Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 855 (1979), and *Dayton*, 443 U.S. at 534 n. 8.

Furthermore, the Ninth Circuit did not take issue with the historical facts as established by the trial court, but only with the inferences to be drawn from those facts. *Diaz* V, Pet. App. A, A-6. Thus, the conviction of mistake did not rest upon a perception by the appellate court that the underlying facts were different from those found by the trial court. Simply put, the Ninth Circuit, after giving the trial court's findings the appropriate deference, could not agree with the ultimate finding—the absence of segregative intent.

A comparison of the opinions of the district court and the opinion of the Ninth Circuit in *Diaz* V reveals that the appellate court was aware of both the record and the bases of the trial court's conclusions. This is not a case where the findings were overturned merely because the appellate court thought too little weight was ascribed to the evidence. Neither did the Court of Appeals here fail to show any bases for its conclusions, nor misunderstand the bases for the trial court's conclusions. *Compare Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. at 855, 856 n.17, 857 n.18.

Rather, the Ninth Circuit has taken great pains to examine the evidence in the record as well as the district

court's findings, with the result that the appellate court was firmly convinced that the trial judge had made a mistake. *Diaz* V, Pet. App. A, A-6. The following examples are not exhaustive.

The trial court concluded that even though the racially-based faculty assignments in the District were illegal, *Diaz* III, Pet. App. D, A-91, they were not reflective of segregative intent because there was no evidence of segregative effect thereby on the students, *Diaz* III, Pet. App. D, A-92, and because the assignments were for a "benign purpose". *Diaz* III, Pet. App. D, A-93. The Ninth Circuit clearly understood the basis for the trial court's conclusion, but differed with the lower court as to the *logical effect* of the facts. *Diaz* V at Pet. App. A, A-19-20.

With respect to the double sessions utilized by the District to relieve overcrowding, the trial court found no inference of segregative intent, even though double sessions were recognized as being educationally disadvantageous, *Diaz* III, Pet. App. D, A-81, and thus difficult to justify merely on the basis of a neighborhood school policy. The Ninth Circuit reasoned that the use of double sessions had probative value, especially in light of the Board's willingness to depart from its neighborhood school policy and allow transfers outside of attendance areas from crowded schools at the behest of Anglo parents. *Diaz* V, Pet. App. A, A-19-21.

One of petitioners' examples of the Court of Appeals' "lack of deference", Pet. at 25, to the findings of the trial court is the Ninth Circuit's finding that petitioners' failure to comply with their affirmative duty to desegregate inferred segregative intent. Pet. at 26. Petitioners argue,

illogically, that such a refusal to comply with law must have been motivated by segregative intent or by a desire to adhere to the neighborhood school policy. The Ninth Circuit found that petitioners must have been "motivated, at least in part, by a desire to avoid desegregation rather than a sincere commitment to the educational benefits of neighborhood schools." *Diaz* V, Pet. App. A, A-13. The Ninth Circuit need not have concluded, and clearly did not conclude, that petitioners were motivated *solely* by segregative intent. Although the appellate court did not draw the same inference as the trial court, the inference of segregative intent was clearly permissible. This is simply another instance where the Ninth Circuit agreed with the underlying facts, but was forced to draw a different inference. (In the proper case failure to act in a manner required by law may provide direct evidence of segregative intent. *See Columbus*, 443 U.S. at 462 n. 11.)

Petitioners also see a lack of deference in the view taken by the Ninth Circuit of the Board's representations as to the effect of proposed bond issues. The Ninth Circuit found that any doubt of the Board's segregative intent was dispelled by the Board's statements reassuring the public that bond issue funds could not be used for busing; but that busing would be necessary to relieve overcrowding if the bonds did not pass. *Diaz* V, Pet. App. A, A-26-27. The trial court, on the other hand, while recognizing that "the repeated assurances . . . that no funds would subsidize busing may have assured voters who feared forced integration", *Diaz* I, Pet. App. F, A-155, decided (clearly erroneously) that where there was no affirmative constitutional obligation to bus, no segregative intent could be inferred from the representations. *Id.*

The district court applied the same type of reasoning to its analysis of the Board's response to QUEST. The District represented to the State Department of Education that progress was being made on the imbalance problem through QUEST. *Diaz* I, Pet. App. F, A-147. But in spite of the fact that the Board was "less than supportive" of QUEST, *Diaz I*, Pet. App. F, A-155, and the fact that none of QUEST's proposals was ever adopted, *Diaz* I, Pet. App. F, A-147, the trial court concluded that no segregative intent could be implied because the board had no affirmative duty to integrate. *Diaz* I, Pet. App. F, A-155.

The proper way to view evidence going to the issue of segregative intent is as a *whole*. As the above discussion shows, and the Ninth Circuit held, the trial court failed to consider the *cumulative* impact of the evidence in this case. *Diaz* V, Pet. App. A, A-28, citing *Washington v. Davis*, 426 U.S. 229, 242 (1976), *Arlington Heights*, 429 U.S. at 266-268, *Flores v. Pierce*, 617 F.2d 1386, 1389 (9th Cir., 1980), *cert. denied*, 449 U.S. 875 (1980). The question is not whether each piece of evidence alone points to segregative intent, but whether it is likely that all the relevant acts together would have occurred in the absence of segregative intent.

D. This case is not appropriate for Supreme Court review since the clearly erroneous standard would not thereby be further explained.

This Court has just recently made clear that determinations of discriminatory intent are subject to the clearly erroneous standard of Rule 52(a). *Pullman-Standard v. Swint*, 456 U.S. 273 (1982). Because the Ninth Circuit

recognized and complied with that standard, there is no need to review this record yet again.

It bears repeating that the Ninth Circuit cited both Rule 52(a) and *Pullman-Standard* early in its opinion. *Compare Pullman-Standard,* 456 U.S. at 290 *with Diaz* V, App. A, A-5. The Ninth Circuit properly considered the cumulative weight of the evidence, and found that "[a]n inescapable conclusion that the Board intended segregation" emerged, *Diaz* V, Pet. App. A, A-30. A remand to correct any error of the district court in *not* considering the cumulative weight of the evidence would serve no purpose because as the Ninth Circuit has noted, there could be only one result. *See Pullman-Standard,* 456 U.S. at 292.

In fact, the granting of this petition would merely lead to a factual determination by this Court as to whether *this* district court was or was not clearly erroneous. To do so would not further delineate the bounds of Rule 52(a) or the clearly erroneous standard in any respect. Thus, the result would be of interest only to the parties here.

IV. This Court's Limited Resources Should Not Be Expended On This Case.

A. No new legal principles are likely to emerge.

Petitioners' three "Questions Presented" have been dealt with above. The first question, whether an inference of segregative intent arises "as a matter of law" when decisions consistent with a neighborhood school policy have the foreseeable and foreseen result of maintaining and exacerbating ethnic imbalance, has been answered by the Ninth Circuit in its previous opinions. The (obvious)

answer, and one consistent with this Court's prior decisions, is simply—"it depends." It depends on the totality of relevant facts and circumstances. Within the peculiar facts and circumstances of this case, the answer is yes. In a different case, the answer could be no. This Court would neither be making new law nor would it be clarifying any confusion as to existing law if it granted the petition as to this issue.

Petitioners' second "Question" should not serve as a vehicle for granting the writ, inasmuch as *this Court is being asked to rule upon a legal proposition not even presented in this case.* The Ninth Circuit did not hold that local school boards are forbidden from making decisions with foreseeable and foreseen segregative impact; indeed, the court made clear that such decisions have no constitutional significance "one way or the other" absent an examination of everything else going on within the District. *Diaz* V, Pet. App. A, A-7, *see Diaz* II, Pet App. E, A-108, The answer to petitioners' second issue is simply "no." This is already the law.

Finally we have petitioners' third "Question." This court is simply being asked to review whether the Ninth Circuit correctly analyzed the district court's decisions consonant with the mandate of Rule 52. As has been discussed above, this Court's recent decision in *Pullman-Standard v. Swint,* was cited and used by the Ninth Circuit as the controlling case, and the Ninth Circuit performed its analysis consistent with this precedent. (Indeed, the dissenting Judges did not disagree with the Rule 52(a) analysis, although they disagreed with the result.) Even if the Ninth Circuit reached the wrong result in this

case (which it did NOT), the case should not be reviewed for this reason alone.

B. A review would necessitate reexamination of a voluminous factual record.

Petitioners themselves note that a review of this case would involve reexamination of a trial transcript by their calculation exceeding 1400 pages in length. Pet. at 22. Indeed, the reporter's transcript exceeds 1600 pages and the clerk's transcript occupies 1000 pages; thus, exclusive of exhibits, the record exceeds 2600 pages.

The decision to grant a writ should not be made merely to review the peculiar facts of this particular piece of litigation.

———o———

CONCLUSION

The petition for a writ of certiorari presented by the San Jose Unified School District consists of a number of "red herrings" designed to interest this Court in areas appropriate for the exercise of its discretionary jurisdiction. An analysis of the Ninth Circuit opinion under attack shows, however, exactly how specious petitioners' arguments are. The Ninth Circuit is not about to deal a killing blow to the concept of neighborhood education; it clearly has a better grasp of the relevance of a neighborhood policy in school desegregation litigation than do petitioners.

Likewise, the Ninth Circuit's analysis of the district court's decision is unobjectionable—the ultimate fact of

segregative intent was established with the clearly erroneous standard of review in conformance with the mandate of *Pullman-Standard v. Swint.*

We have come full circle to what this case has always been about—whether the acts and omissions of the San Jose Unified School District, under all the surrounding facts and circumstances, were undertaken with segregative intent. Two-thirds of the FIFTEEN appellate judges who have already wrestled with the case have concluded the answer is a clear and convincing "yes."

But this is not enough for petitioners, who wish for one more bite of the judicial apple, while, ironically, and absurdly, arguing that this Court should strike down the Ninth Circuit's opinion as "an invitation to litigants to appeal, and to keep appealing, until their (or their opponents') resources are exhausted." Pet. at 26-27.

The district court itself noted that "[c]ontinued failure to choose the path which leads towards less ethnic imbalance in the schools could well, at some future time, form the basis for a conclusion that the school officials do, in fact, wish to keep the Anglos and the Spanish-surnamed students segregated in the SJUSD." *Diaz* III, Pet. App. D, A-99. The Ninth Circuit determined that the conclusion must be made now.

It is time, after thirteen years of litigation on the liability issue alone, for the parties, under the watchful eye of the district court, to begin the productive and creative task of fashioning a remedy which simultaneously eradicates segregation, is educationally sound, and to the extent humanly possible, has community support.

For the foregoing reasons, the petition for a writ of certiorari must be DENIED.

Respectfully submitted,

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No. 84-1417

In The

Supreme Court of the United States

October Term, 1984

San Jose Unified School District, Charles Knight, individually and as District Superintendent of the San Jose Unified School District; Neil H. Geier, Jr., Elizabeth J. Allen, Edwin P. Jones, Jr., Mary K. McCreath, and Donald L. Raimondi, individually and as members of the Board of Education of the San Jose Unified School District,

Petitioners,

vs.

Arnulfo M. Diaz and Socorro Diaz, as the parents and next friends of Fernando Diaz, Miguel A. Diaz and Juan F. Diaz; Jose Vasquez, as the parent and next friend of David Vasquez, individually and on behalf of all other persons similarly situated,

Respondents.

On Certiorari to the United States Court of Appeals For The Ninth Circuit

SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

In respondents' Brief in Opposition to Petition for a Writ of Certiorari ("Opposition"), it was demonstrated that petitioners' only colorable claim in this Court is that the Court of Appeals for the Ninth Circuit misapplied the "clearly erroneous" standard of Federal Rule of Civil Procedure 52(a).

After submission of the Opposition, respondents found that this Court had just decided a case dealing with that very issue, *Anderson v. City of Bessemer City,* — U.S. —, 53 U.S.L.W. 4314 (U.S. March 19, 1985).

A reading of this case provides additional reasons for denial of the petition herein; consequently, respondents submit this supplemental brief.

I. The Ninth Circuit's Opinion Is In Harmony With Anderson v. City of Bessemer City.

The case of *Pullman-Standard v. Swint,* 456 U.S. 273 (1982), made clear that discriminatory intent under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.,* is a question of fact which may be overturned on appeal only if it is clearly erroneous. All parties agree that the clearly erroneous standard is applicable to the issue of segregative intent requisite to a finding of liability in a Fourteenth Amendment school segregation case.

Anderson provides guidance in the application of the *Pullman-Standard* rule. In the former case, the Court of Appeals for the Fourth Circuit reviewed the record in a Title VII case and, after discarding findings of evidentiary fact, held that the district court's finding of ultimate

fact, the existence of discrimination, was clearly erroneous. *Anderson* at 4316. This Court explained that a reviewing court is not to conduct a *de novo* review of the record and substitute its judgment for that of the trier of fact. *Anderson* at 4317. As respondents' Brief in Opposition explained, the Ninth Circuit in *Diaz* V showed no lack of deference to the findings of the trial court. Opp. at 18-21.

In *Anderson* this Court reaffirmed the correct standard under Rule 52(a), which is whether, although there is evidence to support the trial court's findings, the reviewing court is left with a firm conviction a mistake has been made. *Anderson* at 4317, citing *U.S. v. U.S. Gypsum,* 333 U.S. 364, 395 (1948). The Fourth Circuit erred in second-guessing the district court's findings on relative qualifications among job applicants and in failing to give due regard to determinations based on credibility. *Anderson* at 4317-18. This amounted to an impermissible *de novo* review. *Anderson* at 4317.

In the case at bench, no such mistakes were made. The Ninth Circuit did not quarrel with any of the district court's findings of evidentiary fact. The Ninth Circuit—and the parties—accepted the district court's "comprehensive and accurate findings covering the significant historical facts." *Diaz* V, Pet. App. A, A-6; Opp. at 16. The Ninth Circuit held that the inferences drawn from these evidentiary facts did not — could not — logically follow. See, e.g., the discussion at *Diaz* V, Pet. App. A, A-2. (It was clear error on the part of the district court to find that decisions unrelated to the existence or non-existence of a neighborhood school policy could be insulated by reference to that same policy).

The Ninth Circuit summed up its review by noting that a careful review of the entire record, accepting the district court's basic findings, and applying the "cumulative weight of the evidence" test required by *Arlington Heights v. Metropolitan Housing Development Corp.* lead to "an *inescapable* conclusion that the [petitioners] intended segregation." *Diaz* V, Pet. App. A, A-30. (Emphasis added.)

The Ninth Circuit, thus, clearly understood and applied the rule articulated in *Anderson* that a Court of Appeals may reject a district court's findings only if they are implausible. *Anderson* at 4317. The Ninth Circuit's review comports with the requirements articulated in *Anderson* and review of this case would be redundant.

For these reasons, the petition should be denied.

Respectfully submitted,

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ALEXANDER L. STEVAS
CLERK

No. A-543

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

SAN JOSE UNIFIED SCHOOL DISTRICT,
CHARLES KNIGHT, individually
and as District Superintendent
of the San Jose Unified School District;
NEIL H. GEIER, JR., ELIZABETH J. ALLEN,
EDWIN P. JONES, JR., MARY K. MCCREATH,
and DONALD L. RAIMONDI,
individually and as members of the Board of
Education of the San Jose Unified School District,
Petitioners,

VS.

ARNULFO M. DIAZ and SOCORRO DIAZ,
as the parents and next friends
of FERNANDO DIAZ, MIQUEL A. DIAZ
and JUAN F. DIAZ; JOSE VASQUEZ,
as the parent and next friend of
DAVID VASQUEZ, individually and on behalf
of all other persons similarly situated,
Respondents.

On Writ of Certiorari to the United States Court of Appeals For The Ninth Circuit

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TABLE OF CONTENTS

	Page
Introduction	1
I	
The Ninth Circuit Inferred Unconstitutional Segregative Intent On The Basis Of An Improper Legal Rule Which, If Generally Applied, Will Have Important and Harmful National Consequences	1
II	
The Ninth Circuit Misunderstood the Legal Implications Of A Neighborhood School Policy In A Way That Will Preclude The Operation of Neighborhood Schools In Many Metropolitan Areas	2
III	
The Ninth Circuit Improperly Applied The "Clearly Erroneous" Standard of Fed. R. Civ. P. 52(a)	3
Conclusion	5

TABLE OF AUTHORITIES CITED

Cases

Page

Anderson v. City of Bessemer City, 53 U.S.L.W. 4314, (U.S. March 19, 1985) 3, 4

Dayton Board of Education v. Brinkman, 433 U.S. 526, (1979) 1

Wayte v. United States, 53 U.S.L.W. 4319, (U.S. March 19, 1985) 1

Federal Rules of Civil Procedure

Rule 52(a) 3, 4

INTRODUCTION

Respondents argue that certiorari should not be granted "merely to review the peculiar facts of this particular piece of litigation." Brief in Opposition to Petition for a Writ of Certiorari ("Opp.") at 24. This case goes beyond its factual setting, however, and involves three specific errors of law in the opinion of the Ninth Circuit, errors which have implications of national importance.

I

THE NINTH CIRCUIT INFERRED UNCONSTITUTIONAL SEGREGATIVE INTENT ON THE BASIS OF AN IMPROPER LEGAL RULE WHICH, IF GENERALLY APPLIED, WILL HAVE IMPORTANT AND HARMFUL NATIONAL CONSEQUENCES

Although respondents correctly state that an inference of unconstitutional segregative intent will depend "on the totality of relevant facts and circumstances," Opp. at 23, they fail to recognize that this Court has insisted upon constitutional guidelines to determine how and on what basis such an inference can be drawn. *See, e.g., Wayte v. United States,* 53 U.S.L.W. 4319, 4322 (U.S. March 19, 1985). In particular, this Court has stressed that the "foreseeability of segregative consequences" cannot alone create an inference of unconstitutional segregative intent. *Dayton Board of Education v. Brinkman ("Dayton II"),* 443 U.S. 526, 536 n.9 (1979).

Respondents correctly quote the Ninth Circuit's observation that "[p]roof that the segregative effects of a decision were foreseeable is not to be taken, *as a general proposition,* to make out a *prima facie* case of segregative intent," Opp. at 8, *Diaz V,* App. A, A-4 (emphasis added). But respondents fail to acknowledge the Ninth Circuit's additional conclusion that where "the adverse consequences are clearly identified and repeatedly articulated to the decisionmaking body, the inevitability of the adverse effects provide a strong inference of illegitimate intent." *Diaz V,* App. A, A-4 n. 1. This conclusion creates a legal rule by which segregative intent may be inferred, and close examination of the

Ninth Circuit's opinion demonstrates that it is predicated upon the application of this rule. The Ninth Circuit's rule, however, is inconsistent with *Dayton II,* with the important distinction between *de jure* and *de facto* ethnic imbalance which this Court has repeatedly emphasized, and with the continued viability of neighborhood education in those metropolitan areas faced with *de facto* ethnic imbalance. *See* Petition for Writ of Certiorari ("Pet."), at 10-13.

II

THE NINTH CIRCUIT MISUNDERSTOOD THE LEGAL IMPLICATIONS OF A NEIGHBORHOOD SCHOOL POLICY IN A WAY THAT WILL PRECLUDE THE OPERATION OF NEIGHBORHOOD SCHOOLS IN MANY METROPOLITAN AREAS

Respondents argue that the existence of a neighborhood school policy is simply one fact to be considered in light of all the circumstances of a case, Opp. at 6, and that therefore "there is much more than adherence to a neighborhood school policy involved in this litigation; petitioners' announcement of the death of such a policy is highly exaggerated." Opp. at 14.

Respondents, however, do not deny that the Ninth Circuit ruled as a matter of law that a neighborhood school policy was legally irrelevant to various important school board decisions involving such matters as the siting of new schools, the closing of old schools, and the use of portable classrooms. *Diaz V,* App. A-7-10; *Diaz II,* App. A-106-08; Pet. at 14-18. Indeed, respondents appear to embrace and defend this ruling. Opp. at 17.

But this ruling profoundly misunderstands the nature of a neighborhood school policy, and it raises significant constitutional barriers to the continued existence of neighborhood education in metropolitan school districts faced with *de facto* ethnic separation. Pet. at 14-18. The effect of this ruling can be illustrated by the opinion of the Ninth Circuit which, as respondents stress, claimed to rest upon "the *cumulative* impact of the evidence in this case" taken "as a *whole.*" Opp. at 21. Prominent among the evidence cited by the Ninth Circuit as supporting its judgment of

segregative intent were petitioners' decisions relating to such matters as school sitings, school closings, and the use of portable classrooms. If the Ninth Circuit had applied the correct legal rule to these decisions, and viewed them as potentially justified applications of a neutral neighborhood school policy, it might well have viewed the "totality" of the evidence in a different light.

III

THE NINTH CIRCUIT IMPROPERLY APPLIED THE "CLEARLY ERRONEOUS" STANDARD OF FED. R. CIV. P. 52(a)

Respondents are unable to adduce any evidence that the Ninth Circuit fulfilled or even acknowledged its duty of deference toward the trial court's finding of fact that petitioners acted without segregative intent. Instead respondents contend that even if the Ninth Circuit accepted "the historical facts as established by the trial court," it was free to differ with the "inferences to be drawn from those facts," so long as the inferences of segregative intent drawn by the Ninth Circuit were "permissible." Opp. at 18, 20.

Respondents' accurately reflect the basis for the Ninth Circuit's opinion. This Court, however, has clearly and unequivocally rejected this position, holding that an appellate court may not use the "clearly erroneous" standard of Rule 52(a) to substitute its inferences for those of a trial court, even if the inferences of the appellate court are "permissible":

> If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

Anderson v. City of Bessemer City, 53 U.S.L.W. 4314, 4317 (U.S. March 19, 1985).

The Ninth Circuit never held, nor could it have held, that the inferences drawn by the trial court were "impermissible". It merely held that the trial court was incorrect in finding that petitioners had acted without segregative intent. But, as this Court has recently held, the plainly erroneous "standard does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Rule 52 if it undertakes to duplicate the role of the lower court." *Ibid.* Maintenance of a proper respect for the "clearly erroneous" standard is particularly important in the area of school desegregation, for appellate duplication of the complex and extensive factfinding involved in these cases will cause precisely that "huge cost in diversion of judicial resources" which Rule 52 was designed to prevent. *Ibid.*

In their brief respondents attempt to reargue the facts, and cite various school board decisions which respondents claim justify the Ninth Circuit's conclusion that the trial court's judgment was clearly erroneous. But this kind of factual argumentation is irrelevant. The issue is rather whether the trial court considered each of these school board decisions, and whether the trial court's judgment that these decisions did not individually or cumulatively justify a finding of improper segregative intent is implausible or impermissible. In point of fact, the trial court did carefully and extensively consider each of these decisions, and its judgments with respect to each of them are plainly plausible and permissible.[1] Rule 52(a) requires that appellate inquiry go no further, a

---

[1] The trial court's evaluation of many of the decisions mentioned in respondents' Opposition are discussed in petitioners' original brief. *See* Pet. at 18 n.17, 19-27. With respect to the trial court's discussion of the "restructuring" of the downtown junior high schools, Opp. at 13, *see Diaz III,* App. A-78-79; the trial court's discussion of QUEST, Opp. at 14, can be found at *Diaz III,* App. A-88-91, A-85-86; its discussion of the use of "double sessions," Opp. at 19, can be found at *Diaz III,* App. A-81-82, *Diaz I,* App. A-154; its discussion of the "Little Orchard neighborhood" and of the decision to permit voluntary transfers from attendance areas, Opp. at 12-13, is at *Diaz III,* App. A-72-73, A-95-97, *Diaz I.* App. A-136, A-158-61.

requirement overlooked by the Ninth Circuit and by respondents' Opposition.

CONCLUSION

For the above reasons, petitioners respectfully request that a writ of certiorari issue to review and ultimately to reverse the judgment of the Ninth Circuit Court of Appeals.

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